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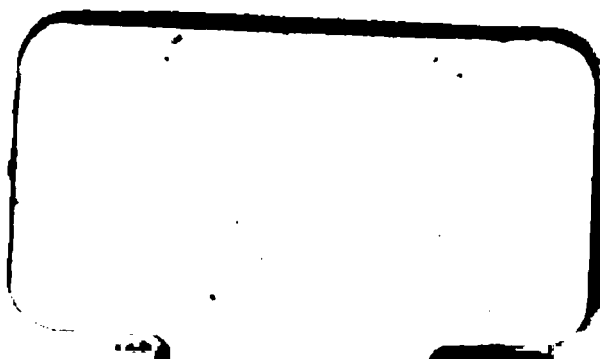
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1871

California. Laws, statutes, etc.

REVISED LAWS

OF THE

STATE OF CALIFORNIA;

IN FOUR CODES:

POLITICAL, CIVIL, CIVIL PROCEDURE AND PENAL.

V, 3

CODE OF CIVIL PROCEDURE.

SACRAMENTO:

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INTRODUCTORY NOTE.

Our first intention was to embody the "Revised Laws" in three Codes—Political, Civil and Penal; but, upon more mature consideration, we have resolved to divide the Civil Code, and insert the laws relating to the rights of persons and things in one Code, to be known as the "Civil Code," and the laws relating to remedies in another, to be known as the "Code of Civil Procedure." We now submit our report of the latter Code.

This Code contains the laws relative to—

Courts of Justice and Judicial Officers.

Juries.

Ministerial Officers of Courts.

Attorneys and Counsellors.

Civil Practice.

Limitation of Actions.

Writs of Review, Mandate and Prohibition.

Contested Elections.

Confession of Judgment without Action.

Submitting Controversy without Action.

Discharge of Persons Imprisoned on Civil Process.

Forcible Entry and Unlawful Detainer.

Eminent Domain.

Enforcement of Liens.

Contempts.

Arbitration.

Voluntary Dissolution of Corporations.

Escheated Estates.

Change of Names.

Probate Practice.

Evidence, and kindred topics.

The numbers in parentheses (1) are the numbers of the sections of the Practice and Probate Acts, as they originally stood in those Acts.

All material changes made have been noted under the sections.

In numbering the sections, we have thought it best to leave room for additional sections at the end of each chapter and article. For instance, Chapter 4 of Title II, Part I, ends with Section 179, and the next chapter commences with Section 182, thus leaving it in the power of the Legislature, if ever occasion arises, to add new sections to any given chapter without disarranging the old sections.

CREED HAYMOND,

JOHN C. BURCH,

CHARLES LINDLEY,

Commissioners.

CAMERON H. KING,

WILL J. BEATTY,

Secretaries.

ANALYSIS OF THE CONTENTS.

DIVISIONS.

- PART I.—OF COURTS OF JUSTICE.
- II.—OF CIVIL ACTIONS.
- III.—OF SPECIAL PROCEEDINGS OF A CIVIL NATURE.
- IV.—OF EVIDENCE.

SECTION 1. TITLE OF VOLUME. 1

PRELIMINARY PROVISIONS.

SECTION 2. When this code takes effect. 3

- 3. Not retroactive 3
- 4. Rule of construction of this code..... 4
- 5. Provisions similar to existing laws, how construed..... 4
- 6. Actions, etc., not affected by this code..... 4
- 7. Limitations shall continue to run 4
- 8. Certain terms used in this code defined..... 4
- 9. Words and phrases..... 6
- 10. Joint authority..... 6
- 11. Computation of time..... 6
- 12. "Seal" defined 6
- 13. Judicial remedies defined..... 6
- 14. Division of judicial remedies 6
- 15. Action defined..... 6
- 16. Special proceeding defined..... 6
- 17. Division of actions..... 6
- 18. Civil actions arise out of obligations or injuries..... 7
- 19. Obligation defined. 7
- 20. Division of injuries..... 7
- 21. Injuries to property..... 7
- 22. Injuries to the person..... 7
- 23. Civil action, by whom prosecuted..... 7
- 24. Criminal actions..... 7
- 25. Civil and criminal remedies not merged..... 7

PART I.
OF COURTS OF JUSTICE.

TITLE I.

OF THEIR ORGANIZATION, JURISDICTION AND TERMS.

CHAPTER I. Of courts of justice in general..... 11

II. Of the court for the trial of impeachments..... 12

III. Of the supreme court..... 13

IV. Of the district courts..... 20

V. Of the county courts 26

VI. Of the probate court..... 30

VII. Of the municipal criminal court of San Francisco..... 34

VIII. Of justices' courts 35

IX. Of police courts.... ... 37

X. General provisions respecting courts of justice..... 38

CHAPTER I.

COURTS OF JUSTICE IN GENERAL.

SECTION 30. The several courts of this state 11

31. Courts of record..... 12

CHAPTER II.

OF THE COURT FOR THE TRIAL OF IMPEACHMENTS.

SECTION 34. Members of the court..... 12

35. Jurisdiction..... 12

36. Officers of the court..... 12

37. Trial of impeachments provided for in penal code..... 12

CHAPTER III.

OF THE SUPREME COURT.

SECTION 40. Members of the court..... 13

41. Chief justice..... 13

42. Jurisdiction of two kinds... .. 13

43. Original jurisdiction..... 13

44. Appellate jurisdiction..... 14

45. May reverse, affirm or modify, etc., remittitur..... 18

46. Number of judges necessary for the transaction of business..... 18

47. Number to pronounce judgment..... 19

48. Terms, when held. Additional terms. Opinions, etc., may be filed in
vacation..... 19

49. Terms, where held..... 19

CONTENTS.

vii

CHAPTER IV.

OF THE DISTRICT COURTS.

SECTION	54. Judicial districts.....	20
	55. Court in each district.....	20
	56. Judges—election and terms of.....	20
	57. Jurisdiction	20
	58. Terms of court in the first district.....	22
	59. Second district.....	22
	60. Third district.....	22
	61. Fourth district.....	22
	62. Fifth district.....	22
	63. Sixth district.....	23
	64. Seventh district.....	23
	65. Eighth district.....	23
	66. Ninth district.....	23
	67. Tenth district.....	24
	68. Eleventh district.....	24
	69. Twelfth district.....	24
	70. Thirteenth district.....	24
	71. Fourteenth district.....	25
	72. Fifteenth district.	25
	73. Sixteenth district	25
	74. Seventeenth district	25
	75. Terms of the district court, where held..	25
	76. Duration of terms.....	25
	77. Adjournment of the court.....	25
	78. Judgments may be entered in vacation.....	26

CHAPTER V.

OF THE COUNTY COURTS.

SECTION	82. Court in each county.....	26
	83. Judges—election and terms of.....	26
	84. Jurisdiction of two kinds.....	26
	85. Original jurisdiction.....	26
	86. Appellate jurisdiction.....	27
	87. Presumptions in favor of judgments, etc.....	27
	88. Terms of the county court for the respective counties.....	27
	89. Court always open for certain purposes.....	29
	90. Terms of the county court, where held.....	30

CHAPTER VI.

OF THE PROBATE COURT.

SECTION	94. Court in each county.....	30
	95. Judges of.....	30
	96. Judge of, in San Francisco.....	30
	97. Jurisdiction of.....	30
	98. Presumptions in favor of its judgments.....	31
	99. Terms of the court in the respective counties.....	31
	100. Terms, where held....	33

CONTENTS.

CHAPTER VII.

OF THE MUNICIPAL CRIMINAL COURT OF SAN FRANCISCO.

SECTION 104. This court continued.....	34
105. Judge—election and term.....	34
106. Jurisdiction.....	34
107. Presumptions in favor of its judgments.....	34
108. Terms of court.....	34
109. Where held.....	34

CHAPTER VIII.

OF JUSTICES' COURTS.

SECTION 112. Justices of the peace must hold.....	35
113. Justices—election and term.....	35
114. Civil jurisdiction.....	35
115. Civil jurisdiction restricted.....	36
116. Territorial extent of civil jurisdiction.....	37
117. Criminal jurisdiction.....	37
118. Courts, where held and when open.....	37

CHAPTER IX.

OF POLICE COURTS.

SECTION 121. Organization, etc., provided for in political code.....	37
--	----

CHAPTER X.

GENERAL PROVISIONS RESPECTING COURTS OF JUSTICE.

ARTICLE I. Publicity of their proceedings.....	38
II. Incidental powers and duties of courts.....	38
III. Judicial days.....	39
IV. Proceedings when judges do not attend to hold a court.....	40
V. Particular provisions respecting the places of holding the courts of justice.....	41
VI. Seals of the courts of justice.....	42

ARTICLE I.

PUBLICITY OF THE PROCEEDINGS OF THE COURTS OF JUSTICE.

SECTION 124. Sittings public.....	38
125. Limitation on preceding section.....	38

ARTICLE II.

INCIDENTAL POWERS AND DUTIES OF COURTS.

SECTION 128. Powers of court respecting the conduct of judicial proceedings.....	38
129. Courts of record may make rules.....	39
130. When rules take effect.....	39

CONTENTS.

ix

ARTICLE III.

JUDICIAL DAYS.

SECTION 133. Days on which courts, etc., may be held	40
134. Days on which courts shall not be opened.....	40
135. Court appointed, etc., for those days, deemed for next day.....	40

ARTICLE IV.

PROCEEDINGS WHEN JUDGES DO NOT ATTEND TO HOLD A COURT.

SECTION 139. Adjournment of court for absence of judge.....	40
---	----

ARTICLE V.

PARTICULAR PROVISIONS RESPECTING THE PLACES OF HOLDING THE COURTS OF JUSTICE.

SECTION 142. Judge may, in certain cases, change place of holding court.....	41
143. Parties to appear at place appointed.....	41
144. Rooms, etc., when judge may order.....	41

ARTICLE VI.

SEALS OF THE COURTS OF JUSTICE.

SECTION 147. What courts have seals	42
148. Present seals to continue	42
149. Seals for courts not now provided with	42
150. Private seal to be used, when.....	43
151. Seals, by whom kept.....	43
152. To what proceedings to be affixed.....	43

TITLE II.

OF JUDICIAL OFFICERS.

CHAPTER I. Of judicial officers in general.....	43
II. Of the powers and duties of judges at chambers.....	45
III. Particular disqualification of judges.....	46
IV. Incidental powers and duties of judicial officers.....	47
V. Miscellaneous provisions respecting courts and judicial officers.....	48

CHAPTER I.

OF JUDICIAL OFFICERS IN GENERAL.

SECTION 156. Qualifications, as to residence, of justices of supreme court.....	44
157. Qualifications, as to residence, of district judges.....	44
158. Places of residence of judges.....	44
159. Residence in San Francisco construed.....	44
160. District judges may hold courts in another district.....	44
161. County and probate judges may hold court in another county. . . .	44
162. County or probate judge who may hold term in another county, how designated.....	45

CONTENTS.

CHAPTER II.

OF THE POWERS AND DUTIES OF JUDGES AT CHAMBERS.

SECTION 165. Powers of justices of supreme court at chambers.....	45
166. Powers of district and county judges at chambers.....	45
167. Powers of probate judges at chambers.....	45

CHAPTER III.

PARTICULAR DISQUALIFICATION OF JUDGES.

SECTION 170. When disqualified.....	46
171. Not to act as attorney in his own court.....	46
172. Certain judges not to act as attorneys.....	46
173. No judicial officer to have a partner.....	47

CHAPTER IV.

INCIDENTAL POWERS AND DUTIES OF JUDICIAL OFFICERS.

SECTION 176. General powers of judges out of court.....	47
177. Powers of judicial officers as to conduct of proceedings before them	47
178. Same	47
179. Same	47

CHAPTER V.

MISCELLANEOUS PROVISIONS RESPECTING COURTS AND JUDICIAL OFFICERS.

SECTION 182. Subsequent applications for orders, when prohibited.....	48
183. Violation of last section.....	48
184. No proceeding affected by a vacancy in office of judge, etc..	48
185. Proceedings to be in the English language, except in certain counties..	49
186. Abbreviations and figures.....	49
187. Means to be used to execute judicial powers in certain cases.....	49

TITLE III.

OF PERSONS SPECIALLY INVESTED WITH POWERS OF A JUDICIAL NATURE.

CHAPTER I. Of jurors.....	49
II. Of court commissioners.....	60

CONTENTS.

xi

CHAPTER I.

OF JURORS.

ARTICLE	I. Jurors in general...	50
	II. Qualifications and exemptions of jurors.....	51
	III. Manner of selecting and returning jurors for courts of record.....	52
	IV. Time and manner of drawing jurors for courts of record.....	54
	V. Manner of summoning jurors for courts of record... ..	56
	VI. Manner of summoning jurors for courts not of record.....	57
	VII. Manner of summoning jurors of inquest.....	57
	VIII. Obedience to summons, how enforced.....	58
	IX. Of impanelling a grand jury.....	58
	X. Of impanelling trial jury in courts of record.....	59
	XI. Of impanelling a trial jury in courts not of record	59
	XII. Of impanelling juries of inquest.....	60

ARTICLE I.

JURORS IN GENERAL.

SECTION	190. Jury defined	50
	191. Different kinds of juries... ..	50
	192. Grand jury defined.....	50
	193. Trial jury defined.....	50
	194. Number of a trial jury.....	50
	195. Jury of inquest defined.....	51

ARTICLE II.

QUALIFICATIONS AND EXEMPTIONS OF JURORS.

SECTION	198. Who are competent to act as jurors.....	51
	199. Who are not competent to act as jurors	51
	200. Who are exempt	51
	201. Who may be excused.....	52

ARTICLE III.

MANNER OF SELECTING AND RETURNING JURORS FOR COURTS OF RECORD.

SECTION	204. List of persons to serve as jurors to be made by supervisors.. ..	53
	205. How selection shall be made.....	53
	206. List to contain one name for every hundred inhabitants.....	53
	207. Person who served as juror during preceding year not to be selected...	53
	208. List to be placed with clerk.....	53
	209. Duty of clerk on receiving lists.....	53
	210. Register jurors to serve one year.....	54
	211. Upon receiving new lists, old ones to be destroyed	54

CONTENTS.

ARTICLE IV.

TIME AND MANNER OF DRAWING JURORS FOR COURTS OF RECORD.

SECTION 214. Jury to be drawn upon the order of the judge..... 54

215. Clerk to notify county judge and sheriff of time of drawing..... 54

216. Sheriff and judge to witness drawing..... 54

217. Drawing, when to be adjourned..... 55

218. Shall proceed, when..... 55

219. Drawing, how conducted..... 55

220. After adjournment of court, disposition to be made of ballots.. 56

221. Copy of list to be furnished by clerk..... 56

ARTICLE V.

MANNER OF SUMMONING JURORS FOR COURTS OF RECORD.

SECTION 225. Sheriff to summon jurors, how..... 56

226. Court may order jury drawn, when..... 56

227. When jury may be completed from bystanders..... 57

ARTICLE VI.

MANNER OF SUMMONING JURORS FOR COURTS NOT OF RECORD.

SECTION 230. Jurors for police and justices' courts, by whom summoned..... 57

231. How summoned..... 57

232. Officer's return..... 57

ARTICLE VII.

MANNER OF SUMMONING JURIES OF INQUEST.

SECTION 235. How summoned..... 57

ARTICLE VIII.

OBEDIENCE TO SUMMONS, HOW ENFORCED.

SECTION 238. Obedience to summons, how enforced..... 58

ARTICLE IX.

OF IMPANELLING A GRAND JURY.

SECTION 241. Grand jury, when to be impanelled..... 58

242. Grand jury, how constituted..... 58

243. Jury to be impanelled as prescribed in penal code..... 58

ARTICLE X.

OF IMPANELLING TRIAL JURY IN COURTS OF RECORD.

SECTION 246. Clerk to call list of jurors summoned, etc..... 59

247. Jury to be impanelled as prescribed in part two..... 59

CONTENTS.

xiii

ARTICLE XI.

OF IMPANELLING A TRIAL JURY IN COURTS NOT OF RECORD.

SECTION 250. Proceedings in forming jury in courts not of record.....	59
251. How impanelled.....	59

ARTICLE XII.

OF IMPANELLING JURIES OF INQUEST.

SECTION 254. Mode and manner of impanelling.....	60
--	----

CHAPTER II.

OF COURT COMMISSIONERS.

SECTION 258. Court commissioners, how appointed.....	60
259. Powers of court commissioners.....	60

TITLE IV.

OF THE MINISTERIAL OFFICERS OF THE COURTS OF JUSTICE.

CHAPTER I. Of ministerial officers generally.....	61
II. Of the secretary and bailiff of the supreme court.....	62
III. Of phonographic reporters.....	62

CHAPTER I.

OF MINISTERIAL OFFICERS GENERALLY.

SECTION 262. Election, powers and duties, where prescribed.....	61
---	----

CHAPTER II.

OF THE SECRETARY AND BAILIFF OF THE SUPREME COURT.

SECTION 265. Justices may appoint.....	62
266. Tenure and duties.....	62

CHAPTER III.

OF PHONOGRAPHIC REPORTERS.

SECTION 269. How appointed, and duty.....	62
270. Report prima facie correct.....	62
271. Compensation	63

T I T L E V .

OF PERSONS SPECIALLY INVESTED WITH MINISTERIAL POWERS RELATING TO COURTS OF JUSTICE.

CHAPTER I. Attorneys and counsellors at law.....	63
II. Of other persons invested with such powers	71

CHAPTER I.

ATTORNEYS AND COUNSELLORS AT LAW.

SECTION 274. Who may be admitted as attorneys.....	64
275. Qualifications	64
276. Certificate of admission. License.....	64
277. Admission to district and county courts.....	64
278. Oath.....	65
279. Attorneys of other states.....	65
280. Roll of attorneys.....	65
281. Penalty for practising without license.....	65
282. General duties.....	65
283. Authority of attorney.....	68
284. Change of attorney.....	69
285. Notice of change.....	69
286. Death or removal of attorney.....	69
287. Removal and suspension.....	69
288. Conviction of felony. Moral turpitude.....	70
289. Proceedings for removal or suspension.....	70
290. Accusation	70
291. Verification.....	70
292. Citation to answer.....	70
293. Appearance.....	70
294. How to answer.....	70
295. Demurrer	71
296. Answer.....	71
297. Trial	71
298. Reference	71
299. Judgment.....	71

CHAPTER II.

OF OTHER PERSONS INVESTED WITH SUCH POWERS.

SECTION 304. Receivers and guardians.....	71
---	----

CONTENTS.

xv

PART II.
OF CIVIL ACTIONS.

TITLE I.

OF THE FORM OF CIVIL ACTIONS.

SECTION 307. One form of civil action only.....	75
308. Parties to actions, how designated.....	75
309. Special issues not made by pleadings, how tried.....	75

TITLE II.

OF THE TIME OF COMMENCING CIVIL ACTIONS.

CHAPTER I. The time of commencing actions in general.....	76
II. The time of commencing actions for the recovery of real property.....	76
III. The time of commencing actions other than for the recovery of real property	82
IV. General provisions as to the time of commencing actions.....	85

CHAPTER I.

THE TIME OF COMMENCING ACTIONS IN GENERAL.

SECTION 312. Commencement of civil actions.....	76
--	-----------

CHAPTER II.

**THE TIME OF COMMENCING ACTIONS FOR THE RECOVERY OF REAL
PROPERTY.**

SECTION 315. When the people will not sue.....	77
316. When action cannot be brought by grantee from the state.....	77
317. When actions by the people or their grantees are to be brought within five years.....	77
318. Seizin within five years, when necessary in action for real property.....	77
319. Such seizin, when necessary in action or defence arising out of title to or rents of real property.....	78
320. Seizin within two years necessary in action for mining claims.....	78

CONTENTS.

SECTION 321. Such seizin, when necessary in action or defence arising out of title to or rents of mining claims.....	78
322. Entry on real estate.....	78
323. Possession, when presumed. Occupation deemed under legal title, unless adverse.....	78
324. Occupation under written instrument or judgment, when deemed adverse	79
325. What constitutes adverse possession under written instrument or judgment.....	79
326. Premises actually occupied under claim of title deemed to be held adversely.....	79
327. What constitutes adverse possession under claim of title not written....	80
328. Relation of landlord and tenant as affecting adverse possession.....	80
329. Right of possession not affected by descent cast.....	80
330. Certain disabilities excluded from time to commence actions.....	80

CHAPTER III.

THE TIME OF COMMENCING ACTIONS OTHER THAN FOR THE RECOVERY OF REAL PROPERTY.

SECTION 335. Periods of limitation prescribed	82
336. Within five years.....	82
337. Within four years.....	82
338. Within three years.....	82
339. Within two years.....	83
340. Within one year.....	83
341. Within six months.....	83
342. Same.....	84
343. Actions for relief not hereinbefore provided for.....	84
344. Where cause of action accrues on mutual account.....	84
345. Actions by the people subject to the limitations of this chapter.....	84

CHAPTER IV.

GENERAL PROVISIONS AS TO THE TIME OF COMMENCING ACTIONS.

SECTION 350. When an action is commenced.....	85
351. Exception, where defendant is out of the state.....	85
352. Exception as to persons under disabilities.....	85
353. Provision where person entitled dies before limitation expires.....	86
354. In suits by aliens, time of war to be deducted.....	86
355. Provision where judgment has been reversed.....	86
356. Provision where action is stayed by injunction.....	86
357. Disability must exist when right of action accrued.....	86
358. When two or more disabilities exist, etc.....	86
359. This title not applicable to actions against directors, etc. Limitations in such cases prescribed.....	86
360. Acknowledgment or new promise must be in writing.....	87
361. Limitation laws of other states, effect of.....	87
362. Existing causes of action not affected.....	87

TITLE III.

OF THE PARTIES TO CIVIL ACTIONS.

SECTION 367.	Action to be in name of party in interest.....	88
368.	Assignment of thing in action not to prejudice defence.....	88
369.	Executor, trustee, etc., may sue without joining the persons beneficially interested	88
370.	When a married woman is a party—actions by and against	88
371.	Wife may defend, when.....	89
372.	Infant to appear by guardian.....	89
373.	Guardian, how appointed.....	89
374.	Unmarried female may sue, for her own seduction.....	89
375.	Father, etc., may sue, for seduction of daughter, etc.....	90
376.	Father, etc., may sue, for injury or death of child.....	90
377.	When representatives may sue for death of one caused by the wrongful act of another.....	90
378.	Who may be joined as plaintiffs.....	90
379.	Who may be joined as defendants.....	90
380.	Parties in interest, when to be joined. When one or more may sue or defend for the whole.....	91
381.	Plaintiff may sue in one action the different parties to commercial paper.....	91
382.	Tenants in common, etc., may sever in bringing or defending actions..	91
383.	Action, when not to abate by death, marriage or other disability. Proceedings in such case.....	91
384.	Another person may be substituted for the defendant.....	92
385.	Intervention, when it takes place and how made.....	92
386.	Associates may be sued by name of association.....	92
387.	Court, when to decide controversy or to order other parties to be brought in.....	93

TITLE IV.

OF THE PLACE OF TRIAL OF CIVIL ACTIONS.

SECTION 392.	Certain actions to be tried where the subject or some part thereof is situated.....	93
393.	Other actions, where the cause or some part thereof arose	94
394.	Place of trial of actions against counties.....	94
395.	Other actions according to the residence of the parties.....	94
396.	Action may be tried in any county, unless the defendant demand a trial in the proper county.....	95
397.	Place of trial may be changed in certain cases.....	95
398.	When judge is disqualified, cause to be transferred.....	95
399.	Papers to be transmitted. Costs, etc. Jurisdiction, etc.....	95
400.	Proceedings after judgment in certain cases transferred.....	96

TITLE V.

OF THE MANNER OF COMMENCING CIVIL ACTIONS.

SECTION 405. Actions, how commenced.....	96
406. Complaint, how indorsed. When summons may be issued, and how waived	97
407. Summons, how issued, directed, and what to contain.....	97
408. Notice of the pendency of an action affecting the title to real property..	97
409. Summons, how served and returned.....	98
410. Summons, how served.....	98
411. Publication when defendant is absent from the state, concealed, or a foreign corporation having no agent, etc.....	99
412. Manner of publication and appointment of attorney.....	99
413. Proceedings where there are several defendants and part only are served	99
414. Proof of service, how made.....	100
415. When jurisdiction of action acquired.....	100

TITLE VI.

OF THE PLEADINGS IN CIVIL ACTIONS.

CHAPTER I. The pleadings in general.....	101
II. The complaint.....	101
III. Demurrer to the complaint.	102
IV. The answer.....	104
V. Demurrer to answer.....	105
VI. Verification of pleadings.....	105
VII. General rules of pleading.....	107
VIII. Variance—mistakes in pleadings and amendments.....	109

CHAPTER I.

THE PLEADINGS IN GENERAL.

SECTION 420. Definition of pleadings.....	101
421. This code prescribes the form and rules of pleadings	101
422. What pleadings are allowed.....	101

CHAPTER II.

THE COMPLAINT.

SECTION 425. Complaint, first pleading.....	102
426. Complaint, what to contain.....	102
427. What causes of action may be joined.....	102

CONTENTS.

xix

CHAPTER III.

DEMURRER TO THE COMPLAINT.

SECTION 430. When defendant may demur.....	103
431. Demurrer must specify, etc. May be taken to part. May answer and demur at same time.....	103
432. What proceedings are to be had when complaint is amended.....	103
433. Objection not appearing on complaint, may be taken by answer.....	103
434. Objections, when deemed waived.....	103

CHAPTER IV.

THE ANSWER.

SECTION 437. Answer, what to contain.....	104
438. When counter claim may be set up.....	104
439. Counter claim not barred by death or assignment.....	104
440. Answer may contain several grounds of defence. Defendant may answer part and demur to part of complaint.....	105

CHAPTER V.

DEMURRER TO ANSWER.

SECTION 443. When plaintiff may demur to answer.....	105
--	-----

CHAPTER VI.

VERIFICATION OF PLEADINGS.

SECTION 446. Verification of pleadings.....	105
447. Copy of written instrument contained in complaint admitted, unless answer is verified.....	106
448. When defence is founded on written instrument set out in answer, its execution admitted, unless denied by plaintiff, under oath.....	106
449. Exceptions to rules prescribed by two preceding sections.....	106

CHAPTER VII.

GENERAL RULES OF PLEADING.

SECTION 452. Pleadings to be liberally construed	107
453. Sham and irrelevant answers, etc., may be stricken out.....	107
454. How to state an account in pleadings.....	107
455. Description of real property in a pleading.....	107
456. Judgments, how pleaded.....	107
457. Conditions precedent, how to be pleaded.....	108
458. Statute of limitations, how pleaded.....	108
459. Private statutes, how pleaded.....	108
460. Libel and slander, how stated in complaint. Not necessary to allege or prove special damages.....	108

CONTENTS.

SECTION 461. Answer in such cases.....	109
462. Allegation not denied, when to be deemed true. When to be deemed controverted.....	109
463. A material allegation defined.....	109
464. Supplemental complaint and answer.....	109

CHAPTER VIII.

VARIANCE—MISTAKES IN PLEADINGS AND AMENDMENTS.

SECTION 469. Material variances, how provided for.....	110
470. Immaterial variance, how provided for.....	110
471. What not to be deemed a variance.....	110
472. Amendments of course, and effect of demurrer.....	110
473. Amendments by the court. Enlarging time to plead and relieving from judgments, etc.....	111
474. Suing a party by a fictitious name, when allowed.....	111
475. No error or defect to be regarded unless it affects substantial rights....	112

TITLE VII.

OF THE PROVISIONAL REMEDIES IN CIVIL ACTIONS.

CHAPTER I. Arrest and bail	112
II. Claim and delivery of personal property.....	118
III. Injunction.....	121
IV. Attachment	124
V. Receivers	131
VI. Deposit in court.....	133

CHAPTER I.

ARREST AND BAIL.

SECTION 478. No person to be arrested except as prescribed by this code..	113
479. Cases in which defendant may be arrested.....	113
480. Order for arrest, by whom made.....	113
481. Affidavit to obtain order, what to contain.....	114
482. Security by plaintiff before order of arrest.....	114
483. Order, when made, and its form.....	114
484. Affidavit and order to be delivered to the sheriff and copy to defendant.	114
485. Arrest, how made.....	114
486. Defendant to be discharged on bail or deposit.....	115
487. Bail, how given.....	115
488. Surrender of defendant.....	115
489. Same	115
490. Bail, how proceeded against.....	115
491. Bail, how exonerated.....	115

CONTENTS.

xxi

SECTION 492.	Delivery of undertaking to plaintiff, and its acceptance or rejection by him.....	116
493.	Notice of justification. New undertaking, if other bail.....	116
494.	Qualification of bail.....	116
495.	Justification of bail.....	116
496.	Allowance of bail.....	117
497.	Deposit of money with sheriff.....	117
498.	Payment of money into court by sheriff.....	117
499.	Substituting bail for deposit.....	117
500.	Money deposited, how applied or disposed of.....	117
501.	Sheriff, when liable as bail, and his discharge from liability.....	117
502.	Proceedings on judgment against sheriff.....	118
503.	Motion to vacate order of arrest or reduce bail. Affidavits on motion...	118
504.	When the order vacated or bail reduced.....	118

CHAPTER II.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

SECTION 509.	Delivery of personal property, when it may be claimed.....	119
510.	Affidavit and its requisites	119
511.	Requisition to sheriff to take and deliver the property.....	119
512.	Security on the part of the plaintiff and proceedings in serving the order.....	119
513.	Exception to sureties and proceedings thereon, or on failure to except..	120
514.	Defendant, when entitled to redelivery.....	120
515.	Justification of defendant's sureties.....	120
516.	Qualification of sureties.....	121
517.	Property, how taken, when concealed in building or inclosure.....	121
518.	Property, how kept.....	121
519.	Claim of property by third person.....	121
520.	Notice and affidavit, when and where to be filed.....	121

CHAPTER III.

INJUNCTION.

SECTION 525.	Injunction, what is and who may grant it.....	122
526.	When it may be granted.....	122
527.	At what time it may be granted, and what is required to obtain it.....	122
528.	Injunction after answer.....	123
529.	Security upon injunction.....	123
530.	Order to show cause why injunction should not be granted.....	123
531.	Injunction to suspend business of a corporation, how and by whom granted.....	123
532.	Motion to vacate or modify injunction.....	123
533.	When to be vacated or modified.....	124

CONTENTS.

CHAPTER IV.

ATTACHMENT.

SECTION 537. Attachment, when and in what cases may issue.....	124
538. Affidavit for attachment, what to contain.....	125
539. Undertaking on attachment.....	125
540. Writ, to whom directed and what to state.....	126
541. Shares of stock and debts due defendant, how attached and disposed of	126
542. How real and personal property shall be attached..	126
543. Attorney to give written instructions to sheriff what to attach.....	127
544. Garnishment, when garnishee liable to plaintiff.....	127
545. Citation to garnishee to appear before a court or judge.	127
546. Inventory, how made. Party refusing to give memorandum may be compelled to pay costs.....	128
547. Perishable property, how sold. Accounts without suit to be collected..	128
548. Property attached may be sold as under execution, if the interests of the parties require	128
549. When property claimed by a third party, how tried.....	129
550. If plaintiff obtains judgment, how satisfied.....	129
551. When there remains a balance due, how collected.....	129
552. When suits may be commenced on the undertaking.....	130
553. If defendant recover judgment, what the sheriff is to deliver.....	130
554. Proceedings to release attachment, before whom taken.....	130
555. Attachment, in what cases it may be released and upon what terms....	130
556. When a motion to discharge attachment may be made, and upon what grounds.....	131
557. When motion made on affidavit, it may be opposed by affidavit.....	131
558. When writ must be discharged.....	131
559. When writ to be returned.....	131

CHAPTER V.

RECEIVERS.

SECTION 564. Appointment of receiver.....	131
565. Appointment of receivers upon dissolution of corporations.....	132
566. Who shall not be appointed.....	132
567. Oath and undertaking.....	133
568. Powers of receivers.....	133
569. Investment of funds.	133

CHAPTER VI.

DEPOSIT IN COURT.

SECTION 572. Deposit in court.....	133
573. Money paid to clerk must be deposited with county treasurer.....	133
574. Manner of enforcing the order.....	134

TITLE VIII.

OF THE TRIAL AND JUDGMENT IN CIVIL ACTIONS.

CHAPTER I.	Judgment in general.....	134
II.	Judgment upon failure to answer.....	136
III.	Issues—the mode of trial and postponements.....	137
IV.	Trial by jury.....	139
V.	Trial by the court....	145
VI.	Of references and trials by referees.....	148
VII.	Provisions relating to trials in general.....	150
VIII.	The manner of giving and entering judgment.....	155

CHAPTER I.

JUDGMENT IN GENERAL.

SECTION 577.	Judgment defined.....	134
578.	Judgment may be for or against one of the parties.....	135
579.	Judgment may be against one party and action proceed as to others....	135
580.	The relief to be awarded to the plaintiff.....	135
581.	Action may be dismissed or nonsuit entered.....	135
582.	All other judgments are on the merits.....	135

CHAPTER II.

JUDGMENT UPON FAILURE TO ANSWER.

SECTION 585.	In what cases judgment may be had upon the failure of the defendant to answer.....	136
---------------------	---	------------

CHAPTER III.

ISSUES—THE MODE OF TRIAL AND POSTPONEMENTS.

SECTION 588.	Issue defined, and the different kinds.....	137
589.	Issue of law, how raised.....	137
590.	Issue of fact, how raised.....	137
591.	Issue of law, how tried.....	137
592.	Issue of fact, how tried. When issues both of law and fact, the former to be first disposed of.....	137
593.	Clerk must enter causes on the calendar, to remain until disposed of...	138
594.	Parties may bring issue to trial.....	138
595.	Motion to postpone a trial for absence of testimony, requisites of.....	138
596.	In cases of adjournment a party may have the testimony of any witness taken.....	138

CONTENTS.

CHAPTER IV.

TRIAL BY JURY.

ARTICLE I. Formation of jury..... 139
II. Conduct of the trial..... 140
III. The verdict 144

ARTICLE I.

FORMATION OF THE JURY.

SECTION 600. Jury, how drawn..... 139
601. Challenges. Each party entitled to four peremptory challenges..... 139
602. Grounds of challenge..... 139
603. Challenges, how tried..... 140
604. Jury to be sworn..... 140

ARTICLE II.

CONDUCT OF THE TRIAL.

SECTION 607. Order of proceedings on trial..... 141
608. Charge to the jury. Court must furnish in writing, upon request, the
points of law contained therein..... 141
609. Special instructions..... 141
610. View by jury of the premises..... 141
611. Admonition when jury permitted to separate..... 142
612. Jury may take with them certain papers..... 142
613. Deliberation of jury, how conducted..... 142
614. May come into court for further instructions..... 142
615. Proceedings in case a juror become sick..... 143
616. When prevented from giving verdict, the cause may be again tried..... 143
617. While jury are absent, court may adjourn from time to time. Sealed
verdict. Final adjournment discharges the jury..... 143
618. Verdict, how declared. Form of. Polling the jury..... 143
619. Proceedings when verdict is informal..... 143

ARTICLE III.

THE VERDICT.

SECTION 624. General and special verdicts defined.. 144
625. When a general or special verdict may be rendered..... 144
626. Verdict in actions for recovery of money or on establishing counter
claim..... 145
627. Verdict in actions for the recovery of specific personal property..... 145
628. Entry of verdict..... 145

CONTENTS.

xxv

CHAPTER V.

TRIAL BY THE COURT.

SECTION 631. When and how trial by jury may be waived.....	145
632. Upon trial by court, decision to be in writing and filed within twenty days.....	146
633. Facts found and conclusions of law must be separately stated. Judgment on.....	146
634. Finding, how prepared.....	147
635. Proceedings after determination of issue of law.....	148

CHAPTER VI.

OF REFERENCES AND TRIALS BY REFEREES.

SECTION 638. Reference ordered upon agreement of parties, in what cases.....	148
639. Reference ordered on motion, in what cases.....	148
640. Number of referees, qualifications, etc.....	149
641. Either party may object. Grounds of objection.....	149
642. Objections, how disposed of.....	150
643. Referees to report within ten days. Effect of. How excepted to, etc..	150

CHAPTER VII.

PROVISIONS RELATING TO TRIALS IN GENERAL.

ARTICLE I. Exceptions.....	150
II. New trials.....	152

ARTICLE I.

EXCEPTIONS.

SECTION 646. Exceptions may be taken. Time when taken, etc.....	151
647. What deemed excepted to.....	151
648. Exception, form of.....	151
649. Exceptions signed by judge and filed with clerk.....	151
650. Exceptions not presented at time of ruling. Notice to adverse party, how settled upon, etc.....	151
651. Exceptions after judgment, etc.....	151
652. When exception is refused, application to supreme court to prove the same, etc.....	152

ARTICLE II.

NEW TRIALS.

SECTION 656. New trial defined.....	152
657. When a new trial may be granted.....	152
658. On what papers moved for.....	153

SECTION 659. Notice of motion, upon whom served and what to contain.....	153
660. Motion to be heard at the time specified, or dismissed.....	153
661. Judge to make statement on decision of the motion. This statement to constitute bill of exception.....	154

CHAPTER VIII.

THE MANNER OF GIVING AND ENTERING JUDGMENT.

SECTION 664. Judgment to be entered in twenty-four hours, etc.....	155
665. Case may be brought before the court for argument.....	155
666. When counter claim established exceeds plaintiff's demand.....	155
667. In replevin, judgment to be in the alternative, and with damages. Gold coin or currency judgment.....	156
668. Judgment book to be kept by the clerk.....	156
669. If a party die after verdict, judgment may be entered, but not to be a lien.....	156
670. Judgment roll, what to constitute.....	156
671. Judgment lien, when it begins and when it expires.....	157
672. Docket, how kept, and what to contain.....	157
673. Docket to be open for inspection without charge.....	157
674. Transcript to be filed in any county, and judgment to become a lien there.....	157
675. Satisfaction of a judgment, how made.....	158

TITLE IX.

OF THE EXECUTION OF THE JUDGMENT IN CIVIL ACTIONS.

CHAPTER I. The execution.....	158
II. Proceedings supplemental to the execution.....	172

CHAPTER I.

THE EXECUTION.

SECTION 680. Within what time execution may issue.....	159
681. Who may issue the execution, its form, to whom directed and what it shall require.....	159
682. When all the defendants were not served with summons, what to direct	161
683. When made returnable.....	161
684. Money judgments and others, how enforced.....	161
685. Execution after five years.....	162
686. When execution may issue against the property of a party after his death.....	162
687. Execution, how and to whom issued.....	162
688. What shall be liable to be seized in execution. Not to be affected till a levy is made	162

CONTENTS.

xxvii

SECTION 689. When property is claimed by a third party, how the right of property is tried.....	163
690. What exempt from execution.....	163
691. Writ, how executed.....	165
692. Notice of sale under execution, how given.....	165
693. Selling without notice, what penalty attached.....	166
694. Sales, how conducted. Neither the officer conducting it nor his deputy to be a purchaser. Real and personal property, how sold. Judgment debtor, if present, may direct order of sale and the officer shall follow his directions.....	166
695. If purchaser refuses to pay purchase money, what proceedings.....	167
696. Court of justice may proceed in a summary manner against a purchaser refusing to pay. Officer may refuse such purchaser's bid after.....	167
697. These two sections not to make officer liable beyond a certain amount..	167
698. Personal property capable of manual delivery, how delivered to purchaser	167
699. Personal property not capable of manual delivery, how sold and delivered.....	167
700. Real property, when absolute sale or not. In the latter case, what the certificate must contain.....	168
701. Real property so sold, by whom it may be redeemed.....	168
702. When it may be redeemed, and redemption money.....	168
703. When judgment debtor or other redemptioner may redeem.....	169
704. In cases of redemption, to whom the judgments are to be made.....	169
705. What a redemptioner must do in order to redeem.....	169
706. Until the expiration of redemption time court may restrain waste on the property. What not considered waste.....	170
707. Rents and profits.....	170
708. If purchaser of real property be evicted for irregularities in sale, what he may recover and from whom. When judgment to be revived. Petition for the purpose, how and by whom made.....	171
709. Party who pays more than his share may compel contribution.....	171

CHAPTER II.

PROCEEDINGS SUPPLEMENTARY TO THE EXECUTION.

SECTION 714. Debtor required to answer concerning his property, when.....	172
715. Proceedings to compel debtor to appear. In what cases he may be arrested. What bail may be given.....	172
716. Any debtor of the judgment debtor may pay the latter's creditor.....	173
717. Examination of debtors of judgment debtor, or of those having property belonging to him.....	173
718. Witnesses required to testify.....	173
719. Judge may order property to be applied on execution.....	174
720. Proceedings upon claim of another party to property, or on denial of indebtedness to judgment debtor..	174
721. Disobedience of orders, how punished.....	174

TITLE X.

ACTIONS IN PARTICULAR CASES.

CHAPTER I. Actions for the foreclosure of mortgages.....	175
II. Actions for nuisance, waste and wilful trespass, in certain cases, on real property.....	176
III. Actions to determine conflicting claims to real property, and other pro- visions relating to actions concerning real estate.....	177
IV. Actions for the partition of real property.....	179
V. Actions for the usurpation of an office or franchise.....	191
VI. Of actions against steamers, vessels and boats.....	193

CHAPTER I.

ACTIONS FOR THE FORECLOSURE OF MORTGAGES.

SECTION 726. Proceedings in foreclosure suits.....	175
727. Surplus money to be deposited in court.....	175
728. Proceedings when debt secured falls due at different times.....	175

CHAPTER II.

ACTIONS FOR NUISANCE, WASTE AND WILFUL TRESPASS, IN CERTAIN
CASES, ON REAL PROPERTY.

SECTION 731. Nuisance defined, and actions for.....	176
732. Waste, actions for.....	176
733. Trespass for cutting or carrying away trees, etc., actions for.....	176
734. Measure of damages in certain cases under the last section.....	177
735. Damages in actions for forcible entry, etc., may be trebled..	177

CHAPTER III.

ACTIONS TO DETERMINE CONFLICTING CLAIMS TO REAL PROPERTY,
AND OTHER PROVISIONS RELATING TO ACTIONS CONCERNING REAL
ESTATE.

SECTION 738. Parties to an action to quiet title...	177
739. When plaintiff cannot recover costs.....	177
740. If plaintiff's title terminates pending the suit, what he may recover, and how verdict and judgment to be.....	178
741. When value of improvements can be allowed as a set-off.....	178
742. An order may be made to allow a party to survey and measure the land in dispute.....	178
743. Order, what to contain and how served. If unnecessary injury done, the party surveying to be liable therefor.....	178
744. A mortgage must not be deemed a conveyance, whatever its terms	178
745. When court may grant injunction; during foreclosure; after sale on execution, before conveyance.....	178

CONTENTS.

xxix

SECTION 746. Damages may be recovered for injury to the possession after sale and before delivery of possession.....	179
747. Action not to be prejudiced by alienation, pending suit.....	179
748. Mining claims, actions concerning to be governed by local rules.....	179

CHAPTER IV.

ACTIONS FOR THE PARTITION OF REAL PROPERTY.

SECTION 752. Who may bring actions for partition.....	180
753. Interests of all parties must be set forth in the complaint.....	181
754. Lien-holders not of record need not be made parties.....	181
755. Plaintiff must file notice of <i>lis pendens</i>	181
756. Summons must be directed to all persons interested in the property....	181
757. Unknown parties may be served by publication.....	181
758. Answer of defendants, what to contain.....	182
759. The rights of all parties may be ascertained in the action.....	182
760. Partial partition.....	182
761. Lien-holders must be made parties, or a referee be appointed to ascertain their rights.....	183
762. Lien-holders must be notified to appear before the referee appointed....	183
763. The court may order a sale or partition and appoint referees therefor...	183
764. Partition must be made according to the rights of the parties, as determined by the court.....	184
765. Referees must make a report of their proceedings..	184
766. The court may set aside or affirm report, and enter judgment thereon. Upon whom judgment to be conclusive.....	184
767. Judgment not to affect tenants for years to the whole property.....	185
768. Expenses of partition must be apportioned among the parties.	185
769. A lien on an undivided interest of any party is a charge only on the share assigned to such party.....	185
770. Estate for life or years may be set off in a part of the property not sold, when not all sold.....	185
771. Application of proceeds of sale of encumbered property.....	185
772. Party holding other securities may be required first to exhaust them...	186
773. Proceeds of sale, disposition of.....	186
774. When paid into court the cause may be continued for the determination of the claims of the parties.....	186
775. Sales by referees must be at public auction.....	186
776. The court must direct the terms of sale or credit.....	186
777. Referees may take securities for purchase money.....	187
778. Tenants whose estate has been sold shall receive compensation.....	187
779. The court may fix such compensation.....	187
780. The court must protect tenants unknown.....	187
781. The court must ascertain and secure the value of future contingent or vested interests.....	187
782. Terms of sale must be made known at the time. Lots must be sold separately	187
783. Who may not be purchasers	188
784. Referees must make a report of the sale to the court.....	188
785. If confirmed, conveyances may be executed.....	188
786. Proceeding if a lien-holder become a purchaser.....	188
787. Conveyances must be recorded, and will be a bar against parties.....	188

CONTENTS.

SECTION 788. Proceeds of sale belonging to parties unknown must be invested for their benefit.....	188
789. Investment must be made in the name of the clerk of the county.....	189
790. When the interests of the parties are ascertained, securities must be taken in their names	189
791. Duties of the clerk making investments.....	189
792. When unequal partition is ordered, compensation may be adjudged in certain cases.....	189
793. The share of an infant may be paid to his guardian.....	190
794. The guardian of an insane person may receive the proceeds of such party's interest.....	190
795. A guardian may consent to partition without action, and execute releases.....	190
796. Costs of partition a lien upon the shares of the parceners.....	190
797. The court by consent may appoint a single referee.....	191

CHAPTER V.

ACTIONS FOR THE USURPATION OF AN OFFICE OR FRANCHISE.

SECTION 802. Certain writs abolished.....	191
803. Action may be brought against any party usurping, etc., any office or franchise.....	191
804. Name of person entitled to office may be set forth in the complaint. If fees have been received by the usurper, he may be arrested.....	192
805. Judgment may determine the rights of both incumbent and claimant..	192
806. When rendered in favor of applicant.....	192
807. Damages may be recovered by successful applicant.....	192
808. When several persons claim the same office, their rights may be determined by a single action.....	192
809. If defendant found guilty, what judgment to be rendered against him..	192

CHAPTER VI.

OF ACTIONS AGAINST STEAMERS, VESSELS AND BOATS.

SECTION 813. When vessels, etc., are liable. Their liabilities constitute liens	193
814. Actions may be brought directly against such vessels, etc.....	194
815. Complaint must be verified.....	194
816. Summons may be served on the master, mate, etc.....	194
817. Plaintiff may have such vessel, etc., attached.	194
818. The clerk must issue the writ of attachment.....	194
819. Such writ must be directed to the sheriff. Sheriff may release upon sufficient undertaking.....	194
820. Sheriff must execute such writ without delay.....	195
821. The owner, master, etc., may appear and defend such vessel.....	195
822. Proceedings in actions under this chapter.....	195
823. After appearance attachment may, on motion, be discharged.....	195
824. When not discharged, such vessel, etc., may be sold at public auction. Application of proceeds	195
825. Mariners and others may assert their claim for wages, notwithstanding prior attachment. How enforced.....	196
826. Proof of the claims of mariners and others.....	196
827. Sheriff's notice of sale to contain measurement, tonnage, etc.....	197

CONTENTS.

xxxi

TITLE XI.

OF PROCEEDINGS IN JUSTICES' COURTS.

CHAPTER I. Parties and time and place of commencing actions in justices' courts...	197
II. Summons in justices' courts.....	199
III. Of provisional remedies in justices' courts.....	201
IV. Pleadings and trial.....	205
V. New trials.....	210
VI. Judgment and execution.....	211
VII. General provisions relating to justices' courts.....	215

CHAPTER I.

PARTIES AND TIME AND PLACE OF COMMENCING ACTIONS IN JUSTICES' COURTS.

SECTION 832. Parties may appear in person or by attorney.....	198
833. Venue of actions in justices' courts.....	198
834. Judgment by confession, venue of	199
835. Actions in which parties voluntarily appear, venue of.....	199

CHAPTER II.

SUMMONS IN JUSTICES' COURTS.

SECTION 839. Actions, how commenced.....	199
840. Appointment of guardians.....	199
841. Summons, formal and substantial facts of.....	200
842. Time within which summons shall be returned.....	200
843. Summons, by whom and how served and returned.....	201

CHAPTER III.

OF PROVISIONAL REMEDIES IN JUSTICES' COURTS.

ARTICLE I. Of arrest and bail	201
II. Of attachment.....	203
III. Claim and delivery of personal property.....	204

ARTICLE I.

OF ARREST AND BAIL.

SECTION 847. Order of arrest and arrest of defendant.....	201
848. Affidavit and undertaking for order of arrest.....	202
849. A defendant arrested must be taken before the justice immediately.....	202
850. The officer must give notice to the plaintiff of the arrest.. ..	203
851. The officer must detain the defendant.....	203
852. Defendant may demand trial immediately	203
853. Adjournment on motion of defendant must be granted, when.....	203

CONTENTS.

ARTICLE II.

ATTACHMENT.

SECTION 857. Writ of attachment shall issue upon affidavit.....	204
858. Undertaking on attachment must be required.....	204
859. Writ of attachment, substance of. Officer may take an undertaking instead of levying	204
860. Certain proceedings shall apply to all attachments in justices' courts...	204

ARTICLE III.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

SECTION 863. How claim and delivery enforced.....	204
---	-----

CHAPTER IV.

PLEADINGS AND TRIAL.

SECTION 866. Pleadings in justices' courts.. ..	205
867. Pleadings may be oral or in writing.....	205
868. Pleadings, manner of presenting and form of.....	206
869. Complaint, contents of.....	206
870. Answer, contents of.....	206
871. Statement of insufficient knowledge, etc., is deemed a denial.. ..	206
872. Manner of pleading a written instrument.....	206
873. If a copy of an instrument be filed, the signatures will be deemed admitted, unless denied under oath.....	206
874. Demurrer to pleadings in justices' courts.	207
875. Amendment of pleadings.	207
876. Title to real estate cannot be questioned before a justice. Such cases to be certified to the district court.....	207
877. Change of venue in certain cases.....	208
878. Adjournment on demand for a jury.....	208
879. Adjournment not to exceed four months, for want of material testimony	208
880. No continuance for more than ten days to be granted, unless upon filing undertaking.....	209
881. Failure of either party to appear, effect of.....	209
882. Trial by jury.....	209
883. Challenges to jurors.....	210

CHAPTER V.

NEW TRIALS.

SECTION 888. A new trial may be granted, when.....	210
889. Application for new trial.....	210

CHAPTER VI.

JUDGMENT AND EXECUTION.

SECTION 892. Judgment of dismissal entered in certain cases without prejudice.....	211
893. Judgment for plaintiff by default.....	211

CONTENTS.

xxxiii

SECTION 894. Upon issue joined, the justice shall try the cause and render judgment..	212
895. Entry of judgment, time and manner of.....	212
896. If the sum found due exceeds the jurisdiction of the justice, the excess may be remitted.....	212
897. Offer to compromise before trial.....	212
898. Judgment when the defendant is subject to arrest....	212
899. Costs shall be added to the verdict.....	213
900. Execution issued by the justice, except when it is to run out of the county. Judgment liens, how created.....	213
901. Execution may issue at any time within five years.....	214
902. Execution, contents of.....	214
903. Duty of officer receiving execution. Supplementary proceedings.....	214

CHAPTER VII.

GENERAL PROVISIONS RELATING TO JUSTICES' COURTS.

SECTION 907. What provisions applicable to justices' courts.....	215
908. Costs	215
909. May require security for costs.	216
910. Money collected by constable or sheriff to be paid to the justice.....	216
911. Justice's docket, contents of.....	216
912. Entries therein primary evidence of the facts.....	217
913. An index to the docket must be kept.....	217
914. Dockets must be delivered by justice to his successor or county clerk...	217
915. A justice may issue execution or other process, upon the docket of his predecessor.....	217
916. Successor of a justice, who shall be deemed.....	218
917. If two justices might be deemed successors, the county judge shall designate one.....	218
918. Blanks must be filled in all papers issued by a justice, except subpoenas	218
919. In case of disability of a justice, another justice may attend on his behalf.....	218
920. A constable, after the expiration of his term, may execute papers previously commenced.....	218
921. Contempts a justice may punish for.....	219
922. Proceedings and punishments for contempts.....	219
923. The conviction must be entered in the docket.....	219
924. Justices may issue subpoenas and final process to any part of the county.....	220

TITLE XII.

PROCEEDINGS IN CIVIL ACTIONS IN POLICE COURTS.

SECTION 929. How commenced.....	220
930. Summons must issue on filing complaint.....	220
931. Defendant may plead orally or in writing.....	220
932. Trial by jury, when defendant is entitled to.....	221
933. Proceedings to be conducted as in justices' courts.....	221

TITLE XIII.

OF APPEALS IN CIVIL ACTIONS.

CHAPTER I. Appeals in general.....	221
II. Appeals from district courts.....	227
III. Appeals from county courts.....	228
IV. Appeals from probate courts.....	228
V. Appeals to county courts.....	229

CHAPTER I.

APPEALS IN GENERAL.

SECTION 936. Judgment and orders may be reviewed.....	222
937. Orders made out of court, without notice, may be reviewed by the judge	222
938. Party aggrieved may appeal. Names of parties.....	222
939. Within what time appeal may be taken.....	222
940. Appeal, how taken.....	223
941. Appellant must file undertaking within five days.....	223
942. Undertaking on appeal from a money judgment.....	223
943. Appeal from a judgment for delivery of documents.....	224
944. Appeal from a judgment directing the execution of a conveyance, etc..	224
945. Undertaking on appeal concerning real property.....	224
946. Stay of proceedings. The security on appeal may be limited in the case of an execution, etc.....	224
947. Undertaking may be in one instrument or several.....	225
948. Justification of sureties on undertaking on appeal.....	225
949. Undertakings in cases not specified.....	226
950. What papers to be used on an appeal from the judgment.....	226
951. What papers used on appeals from orders, except orders granting or refusing new trials.....	226
952. What papers to be used on an appeal from an order granting or refus- ing a new trial.....	226
953. Copies and undertakings, how certified.....	226
954. When appeal may be dismissed. When not.....	226
955. What may be reviewed on an appeal from judgment.....	227
956. Remedial powers of an appellate court.....	227
957. On judgment on appeal, remittitur must be certified to the clerk of the court below	227
958. Provisions of this chapter not applicable to appeals to county courts...	227

CHAPTER II.

APPEALS FROM DISTRICT COURTS.

SECTION 963. When an appeal may be taken.....	227
---	-----

CHAPTER III.

APPEALS FROM COUNTY COURTS.

SECTION 966. When may be taken.....	228
-------------------------------------	-----

CONTENTS.

xxxv

CHAPTER IV.

APPEALS FROM PROBATE COURTS.

SECTION 969. When may be taken.....	229
970. Executors and administrators not required to give undertaking on appeal.....	229
971. Acts of acting administrator, etc., not invalidated by reversal of order appointing him.....	229

CHAPTER V.

APPEALS TO COUNTY COURTS.

SECTION 974. Appeal from judgment of justices' or police courts.....	230
975. Party appealing on questions of law alone must prepare a statement. Settlement of statement.....	230
976. If the appeal be upon questions of fact, or of law and fact, no statement need be made.....	230
977. Upon the appeal, the justice must transmit the case to the county court	230
978. Undertaking on appeal. Justification of sureties.....	231
979. On filing undertaking, execution must be stayed.....	232
980. Miscellaneous provisions on trials in county courts.....	232

TITLE XIV.

OF THE TRANSFER OF ACTIONS FROM THE STATE TO UNITED STATES COURTS.

SECTION 984. Transfer of suits from state to United States courts.....	233
985. Judgment of the supreme court of this state, when may be reviewed, on error, to the supreme court of the United States.....	233
986. Stay of proceedings until writ of error can be served	234

TITLE XV.

OF MISCELLANEOUS PROVISIONS.

CHAPTER I. Proceedings against joint debtors.. ..	235
II. Offer of the defendant to compromise.....	236
III. Inspection of writings.....	236
IV. Motions and orders.....	237
V. Notices, and filing and service of papers.....	238
VI. Of costs.....	240
VII. General provisions.....	245

CONTENTS.

CHAPTER I.

PROCEEDINGS AGAINST JOINT DEBTORS.

SECTION 989. Parties not summoned in action on joint contract may be summoned after judgment	235
990. Summons in that case, what to contain and how served.....	235
991. Affidavit to accompany summons.....	235
992. Answer, when filed and what it may contain.....	235
993. What constitute the pleadings in the case.....	235
994. Issues, how tried. Verdict, what to be.....	236

CHAPTER II.

OFFER OF THE DEFENDANT TO COMPROMISE.

SECTION 997. Proceedings on offer of the defendant to compromise after suit brought	236
---	-----

CHAPTER III.

INSPECTION OF WRITINGS.

SECTION 1000. A party may demand inspection and copy of a book, paper, etc.....	237
---	-----

CHAPTER IV.

MOTIONS AND ORDERS.

SECTION 1003. Order and motion defined.....	237
1004. Motions and orders, where made.....	237
1005. Notice of motion, at what time to be given.....	237
1006. Transfer of motions and orders to show cause.....	238
1007. Order for payment of money, how enforced.....	238

CHAPTER V.

NOTICES, AND FILING AND SERVICE OF PAPERS.

SECTION 1010. Notices and papers, how served.....	238
1011. When and how served.....	238
1012. Service by mail, when.....	239
1013. Service by mail, how.....	239
1014. Appearance. Notices after appearance.....	239
1015. Service on non-residents. Where a party has an attorney, service shall be on such attorney.....	239
1016. Preceding provisions not to apply to proceeding to bring party into contempt.....	240
1017. Service by telegraph.....	240

CONTENTS.

xxxvii

CHAPTER VI.

OF COSTS.

Section	1021.	Compensation of attorneys. Costs to parties.....	241
	1022.	When allowed, of course, to the plaintiff.....	241
	1023.	Several actions brought on a single cause of action can carry costs in but one.....	241
	1024.	Defendant's costs must be allowed, of course, in certain cases.....	242
	1025.	Costs, when in the discretion of the court.....	242
	1026.	When the several defendants are not united in interest, costs may be severed.....	242
	1027.	Costs of appeal discretionary with the court, in certain cases.....	242
	1028.	Referee's fees.....	242
	1029.	Continuance, costs may be imposed as condition of.....	242
	1030.	Costs when a tender is made before suit brought.....	242
	1031.	Costs in action by or against an administrator, etc.....	243
	1032.	Costs in a review other than by appeal.....	243
	1033.	Costs paid on the commencement of an action.....	243
	1034.	Filing of, and affidavit, to bill of costs.....	244
	1035.	Costs on appeal, how claimed and recovered.....	244
	1036.	Interest and costs must be included by the clerk in the judgment.....	244
	1037.	When plaintiff is a non-resident or foreign corporation, defendant may require security for costs.....	244
	1038.	If such security be not given, the action may be dismissed.....	245
	1039.	Costs when state is a party	245
	1040.	Costs when county is a party.....	245

CHAPTER VII.

GENERAL PROVISIONS.

Section	1045.	Lost papers, how supplied.....	246
	1046.	Papers without the title of the action, or with defective title, may be valid.....	246
	1047.	Successive actions on the same contract, etc.....	246
	1048.	Consolidation of several actions into one.....	246
	1049.	Actions, when deemed pending.....	246
	1050.	Actions to determine adverse claims and by sureties.....	246
	1051.	Testimony, when to be taken by the clerk.....	246
	1052.	The clerk must keep a register of actions.....	246
	1053.	Two of three referees, etc., may do any act.....	247
	1054.	The time within which an act is to be done may be extended.....	247
	1055.	Actions against a sheriff for official acts.....	247
	1056.	Actions may be prosecuted in the Spanish language in certain counties.....	247
	1057.	Undertakings mentioned in this code, requisites of.....	247
	1058.	People of state not required to give bonds when state is a party.....	248

PART III.

OF SPECIAL PROCEEDINGS OF A CIVIL NATURE.

PRELIMINARY PROVISIONS.

SECTION 1063. Parties, how designated.....	251
1064. Judgment and order same meaning as in civil actions.....	251

TITLE I.

OF WRITS OF REVIEW, MANDATE AND PROHIBITION.

CHAPTER I. Writ of review.....	251
II. Writ of mandate.....	253
III. Writ of prohibition.....	257
IV. Writs of review, mandate and prohibition may issue and be heard at chambers.....	258

CHAPTER I.

WRIT OF REVIEW.

SECTION 1067. Writ of review defined.....	252
1068. When and by what courts granted.....	252
1069. Application for, how made.....	252
1070. The writ to be directed to the inferior tribunal, etc.....	252
1071. Contents of the writ.....	252
1072. Proceedings in inferior court may be stayed, or not.....	252
1073. Service of the writ.....	253
1074. The review under the writ, extent of.....	253
1075. A defective return of the writ may be perfected. Hearing and judgment.....	253
1076. Copy of judgment must be sent to the inferior tribunal.....	253
1077. Judgment rolls.....	253
1078. Appeals.....	253

CHAPTER II.

WRIT OF MANDATE.

SECTION 1083. Mandate defined.....	254
1084. When and by what court issued.....	254
1085. Writ, when and upon what to issue.....	254

CONTENTS.

xxxix

SECTION 1086.	Must be either alternative or peremptory. Substance.....	254
1087.	If the application be without notice, the alternative writ may issue ; otherwise, the peremptory. Notice and default.....	255
1088.	The adverse party may answer under oath.....	255
1089.	If an essential question of fact is raised, the court may order a jury trial.....	255
1090.	The applicant may demur to the answer or countervail it by proof....	255
1091.	Certain provisions of part two applicable.....	255
1092.	Motion for new trial, where made.....	256
1093.	The clerk must transmit the verdict to the court where the motion is pending, after which the hearing shall be had on motion.....	256
1094.	If no answer be made, or if the answer raise no material issue of fact, the hearing must be before the court.....	256
1095.	If the applicant succeed, he may have damages, costs and a peremp- tory mandate.....	256
1096.	Service of the writ.....	256
1097.	Penalty for disobedience to the writ.....	256

CHAPTER III.

WRIT OF PROHIBITION.

SECTION 1102.	Prohibition defined.....	257
1103.	Where and when issued.....	257
1104.	Writ may be alternative or peremptory. Form of.....	257
1105.	Certain provisions of the preceding chapter applicable	258

CHAPTER IV.

WRITS OF REVIEW, MANDATE AND PROHIBITION MAY ISSUE AND BE HEARD AT CHAMBERS.

SECTION 1108.	Writs of review, mandate and prohibition may issue and be heard at chambers	258
----------------------	--	-----

TITLE II.

OF CONTESTING CERTAIN ELECTIONS.

SECTION 1111.	Who may contest, and grounds of contest.....	259
1112.	Irregularity and improper conduct of judges, when to annul elections.	259
1113.	When not to.....	259
1114.	Illegal votes, when not to vitiate election.....	259
1115.	Proceedings on contest.....	260
1116.	Statement of cause of contest. When based on reception of illegal votes, contestant to deliver to respondent a list of votes claimed to be illegal.....	260
1117.	Statement of cause of contest; want of form not to vitiate.....	260
1118.	County judge to hold special term for trial of contest.....	261

CONTENTS.

SECTION 1119. Clerk to issue citation to respondent.....	261
1120. Witnesses—attendance of, how enforced.....	261
1121. Power of court. Adjournment of court.....	261
1122. Rules to govern court in trial of contest.....	261
1123. Court may declare who was elected.	262
1124. Fees of officers and witnesses.	262
1125. Costs	262
1126. Appeal.....	262
1127. When election void and office vacant.....	262

TITLE III.

OF SUMMARY PROCEEDINGS.

CHAPTER I. Confession of judgment without action.....	263
II. Submitting a controversy without action.....	264
III. Discharge of persons imprisoned on civil process.....	264
IV. Summary proceedings for obtaining possession of real property in certain cases.....	267

CHAPTER I.

CONFESSION OF JUDGMENT WITHOUT ACTION.

SECTION 1132. Judgment may be confessed for debt due or contingent liability.....	263
1133. Statement in writing and form thereof.....	263
1134. Filing statement and entering judgment.....	263
1135. How, in justices' courts.....	263

CHAPTER II.

SUBMITTING A CONTROVERSY WITHOUT ACTION.

SECTION 1138. Controversy, how submitted without action.....	264
1139. Judgment on, as in other cases, but without costs prior to notice of trial.....	264
1140. Judgment may be enforced or appealed from as in an action.....	264

CHAPTER III.

DISCHARGE OF PERSONS IMPRISONED ON CIVIL PROCESS.

SECTION 1143. Persons confined may be discharged.....	265
1144. Notice of application.....	265
1145. Service of notice.....	265
1146. Examination before judge.....	265
1147. Interrogatories may be in writing.....	265
1148. Oath to be administered.....	265

CONTENTS.

xli

SECTION 1149. Order of discharge.....	266
1150. If not discharged, prisoner may again apply, when.....	266
1151. Discharge final	266
1152. Judgment remains in force.....	266
1153. Plaintiff may order discharge of prisoner, who shall not thereafter be liable to imprisonment for the same cause of action.....	266
1154. Plaintiff to advance funds for support of prisoner.....	266

CHAPTER IV.

SUMMARY PROCEEDINGS FOR OBTAINING POSSESSION OF REAL PROPERTY IN CERTAIN CASES.

SECTION 1159. Forcible entry defined.....	267
1160. Forcible detainer defined.....	267
1161. Unlawful detainer defined.	268
1162. Service of notice.....	268
1163. County courts have jurisdiction.....	269
1164. Parties defendant.....	269
1165. Parties generally.....	269
1166. Complaint. Judge to fix day for appearance of defendant and sum- mons.....	269
1167. Summons, form and service of.....	270
1168. Arrest	270
1169. Judgment by default.....	270
1170. Defendant may appear, etc.....	270
1171. Trial by jury.....	270
1172. Showing required of plaintiff in forcible entry or detainer. Of de- fendant.....	270
1173. Complaint must be amended in certain cases.....	271
1174. Verdict and judgment	271
1175. General provisions.....	271

TITLE IV.

OF THE ENFORCEMENT OF LIENS.

CHAPTER I. Liens in general.....	272
II. Liens of mechanics and others upon real property	272
III. Certain liens for salaries and wages	277

CHAPTER I.

LIENS IN GENERAL.

SECTION 1180. Definition of lien.....	272
---------------------------------------	-----

f

CONTENTS.

CHAPTER II.

LIENS OF MECHANICS AND OTHERS UPON REAL PROPERTY.

SECTION 1183. What laborers, contractors, etc., may have liens upon.....	273
1184. Liens for grading and filling lots and streets.....	273
1185. What interest in the land subject to the lien.....	273
1186. Same.....	274
1187. Effect of liens.....	274
1188. Claim of lien to be filed in recorder's office.....	274
1189. Liens upon two or more pieces of property. Amount due from each to be designated.....	275
1190. Claim to be recorded. Fees of recorder.....	275
1191. Time of continuance of lien.....	275
1192. Suits to enforce liens must be tried in district courts. Rules of plead- ing, etc.	276
1193. Parties.....	276
1194. What contractor entitled to recover. Owner may retain money, when	276
1195. Costs.....	276
1196. Proceeds of sale, how distributed. Execution for deficiency.....	277
1197. Lien does not impair right to proceed for recovery of the debt.....	277
1198. Not to apply to liens already acquired.....	277
1199. New trials and appeals.....	277

CHAPTER III.

CERTAIN LIENS FOR SALARIES AND WAGES.

SECTION 1204. Certain persons preferred creditors when assignment of property is made.....	278
1205. Same, against estates.....	278
1206. Same, in cases of execution or attachment.....	278

TITLE V.

OF CONTEMPTS.

SECTION 1209. What acts or omissions are contempts.....	279
1210. Re-entry on property after eviction, when a contempt.....	280
1211. A contempt committed in the presence of the court may be punished summarily. When not so committed, an affidavit or statement shall be made.....	281
1212. A warrant of attachment may issue or a notice to show cause.....	281
1213. Bail may be given by a person arrested under such warrant.....	281
1214. Sheriff must, upon executing the warrant, arrest and detain the per- son until discharged.....	281
1215. Bail bond, form and conditions of.....	281
1216. Officer must return warrant and undertaking, if any.....	282
1217. Hearing.....	282

CONTENTS.

xliii

SECTION 1218. Judgment and penalty, if guilty	282
1219. If the contempt is the omission to perform any act, the person may be imprisoned until performance.....	282
1220. If a party fail to appear, proceedings.....	282
1221. Illness sufficient cause for non-appearance of party arrested. Confinement under arrests for contempt.....	282
1222. Judgment and orders in such cases final.....	283

TITLE VI.

OF THE VOLUNTARY DISSOLUTION OF CORPORATIONS.

SECTION 1227. How dissolved.....	283
1228. Application, what to contain.....	283
1229. Application, how signed and verified.....	283
1230. Filing application and publication of notice.....	283
1231. Objections may be filed.....	284
1232. Hearing of application.....	284
1233. Judgment roll and appeals.....	284

TITLE VII. (No. 1.)

EMINENT DOMAIN—SPECIAL PROCEEDINGS TO EXERCISE RIGHT OF.

SECTION 1237. Eminent domain defined.....	285
1238. Parties who may exercise the right of eminent domain. Purposes for which it may be exercised.....	286
1239. Classes of estates or interests subject to condemnation.....	289
1240. Private property defined. Classes enumerated.....	290
1241. Facts necessary to be found by court before condemnation.....	290
1242. Parties may make location. May enter to make surveys. Liable for unnecessary injury.....	291
1243. Jurisdiction in district court. Complaint, its contents and verification.....	292
1244. Summons, what to contain. How issued and served.....	292
1245. Who may defend. What the answer may show, and how verified.....	292
1246. Rules of practice.....	293
1247. Court shall have jurisdiction to regulate the mode of making crossings or of enjoying limited, separate or common use. Of location of right of way in extreme cases.....	293
1248. Appointment of commissioners.....	293
1249. Duties and powers of commissioners.....	294
1250. Duties and powers of commissioners, continued.....	294
1251. The date of service of summons, or appearance, determines the time of the accruing of damages.....	295
1252. Commissioners to file report.....	296
1253. Cannot decide upon conflicting claims. Such claims left to the court.....	296

CONTENTS.

SECTION 1254.	Clerk to notify parties of filing of report.....	296
1255.	Motion to set aside report. Recommitment to another commission...	296
1256.	Report confirmed by court.....	297
1257.	Trial by jury, if demanded.....	297
1258.	Amendments. Costs	297
1259.	New proceedings to cure defective title.. ..	298
1260.	Payment of damages.....	298
1261.	Final order of condemnation, what to contain. When filed, title vests	298
1262.	Proceeding in court or chambers.....	299
1263.	Appeals, how taken.....	299
1264.	Putting plaintiff in possession	299

TITLE VII. (No. 2.)

OF EMINENT DOMAIN.

SECTION 1237.	Eminent domain defined.....	301
1238.	Purposes for which it may be exercised.....	301
1239.	What estates in land may be acquired by condemnation.....	302
1240.	Private property defined. Classes enumerated.....	303
1241.	Facts necessary to be found by court before condemnation.....	304
1242.	Parties may make location. May enter to make surveys.....	306
1243.	Jurisdiction in district court. Complaint, its contents and verification	307
1244.	Summons, what to contain. How issued and served.....	307
1245.	Who may defend. What the answer may show, and how verified.....	307
1246.	Court shall have jurisdiction to regulate the mode of making crossings or of enjoying a common use.....	308
1247.	Court or jury to assess damages.....	308
1248.	The date with respect to which compensation shall be assessed, and the measure thereof.....	309
1249.	New proceedings to cure defective title.....	309
1250.	Payment of damages.....	309
1251.	Final order of condemnation, what to contain. When filed, title vests	310
1252.	Putting plaintiff in possession.....	310
1253.	Rules of practice.....	311
	Opinion of Commissioner Burch, concurring with Commissioner Lind- ley on "Eminent Domain"	311

TITLE VIII.

OF ESCHEATED ESTATES.

SECTION 1269.	Manner of commencing proceedings relative to escheated estates.....	316
1270.	Receiver of rents and profits may be appointed.....	317
1271.	Appearance, pleadings and trial.....	317
1272.	Proceedings by persons claiming escheated estates.....	317

CONTENTS.

xlv

TITLE IX.

OF CHANGE OF NAMES.

SECTION 1275. Jurisdiction	318
1276. Application for change of name, how made.....	318
1277. Publication of petition for.....	318
1278. Hearing of application and remonstrance.....	319

TITLE X.

OF ARBITRATIONS.

SECTION 1281. What may be submitted to arbitration, and when.....	319
1282. Submission to arbitration to be in writing.....	319
1283. Submission may be entered as an order of the court. Revocation.....	320
1284. Powers of arbitrators.....	320
1285. Majority of arbitrators may determine any question. They must be sworn	320
1286. Award to be in writing. When judgment to be entered.....	320
1287. Award may be vacated in certain cases.....	321
1288. Court may, on motion, modify or correct the award.....	321
1289. Decision, on motion, subject to appeal, but not the judgment entered before motion.....	321
1290. If submission be revoked and an action brought, what to be recovered	321

TITLE XI.

OF PROCEEDINGS IN PROBATE COURTS.

CHAPTER I. Of jurisdiction.....	322
II. Of the probate of wills.....	323
III. Of executors and administrators, their letters, bonds, removals and suspensions.....	334
IV. Of the inventory and collection of the effects of decedents.....	354
V. Of the provisions for support of family, and of the homestead.....	361
VI. Of claims against the estate.....	369
VII. Of sales and conveyance of property to decedents.....	377
VIII. Of the powers and duties of executors and administrators, and of the management of estates.....	396
IX. Of the conveyance of real estate by executors and administrators in certain cases.....	399
X. Of accounts rendered by executors and administrators, and of the payment of debts.....	402

CHAPTER XI. Of the partition, distribution and final settlement of estates.....	412
XII. Of orders, decrees, process, minutes, records and appeals.....	424
XIII. Of public administrator.....	429
XIV. Of guardian and ward.....	434

CHAPTER I.

OF JURISDICTION.

SECTION 1294. Jurisdiction of probate court over the estate, when exercised.....	322
1295. When jurisdiction decided by first application.....	323

CHAPTER II.

OF THE PROBATE OF WILLS.

ARTICLE I. Petition, notice and proof.....	323
II. Contesting probate of will.....	327
III. Probate of foreign wills.....	329
IV. Contesting will after probate.....	330
V. Probate of lost or destroyed will.....	332
VI. Probate of nuncupative wills.....	333

ARTICLE I.

PETITION, NOTICE AND PROOF.

SECTION 1298. Custodian of will to deliver same, to whom. Penalty.....	324
1299. Who may petition for probate of will.....	324
1300. Contents of petition.....	324
1301. When executor forfeits right to letters.....	324
1302. Will to accompany petition, or its presentation prayed for and how enforced	325
1303. Notice of petition for probate, how given.. ..	325
1304. Heirs and named executors to be notified, how.	325
1305. Petition may be presented to judge at chambers, and what judge may do.....	326
1306. Hearing proof of will after proof of service of notice.....	326
1307. Who may appear and contest the will.....	326
1308. Probate, when no contest.....	327

ARTICLE II.

CONTESTING PROBATE OF WILL.

SECTION 1312. Contestant to file grounds of contest and petitioner to reply.....	327
1313. How jury obtained and trial had.....	328
1314. Verdict of the jury. Judgment. Appeal.....	328
1315. Witnesses, who and how many to be examined. Proof of handwriting admitted, when.....	328
1316. Testimony reduced to writing for future evidence.....	329
1317. If proved, certificate to be attached.....	329
1318. Will and proof to be filed and recorded.....	329

CONTENTS.

xlvii

ARTICLE III.

PROBATE OF FOREIGN WILLS.

SECTION 1322. Wills proved in other states to be recorded, when and where.....	330
1323. Proceedings on the production of a foreign will.....	330
1324. Hearing proofs of probate of foreign will.....	330

ARTICLE IV.

CONTESTING WILL AFTER PROBATE.

SECTION 1327. The probate may be contested within one year.....	331
1328. Citation to be issued to parties interested.....	331
1329. The hearing had on proof of service.....	331
1330. Petitions to revoke probate of will tried by jury or court. Judgment, what.....	331
1331. On revocation of probate, powers of executor, etc., ceases, but not liable for acts in good faith	332
1332. Costs and expenses, by whom paid.....	332
1333. Probate, when conclusive. One year after removal of disability given to infants and others.....	332
1334. District court may set aside will, or decree admitting it to probate, or establish one lost or destroyed.....	332

ARTICLE V.

PROBATE OF LOST OR DESTROYED WILL.

SECTION 1338. Proof of lost or destroyed will to be taken.....	333
1339. Must have been in existence at time of death	333
1340. To be certified, recorded and letters thereon granted.....	333
1341. Court to restrain injurious acts of executors or administrators during proceedings to prove lost will.....	333

ARTICLE VI.

PROBATE OF NUNCUPATIVE WILLS.

SECTION 1344. Nuncupative wills, when and how admitted to probate.....	334
1345. Additional requirements in probate of nuncupative wills.....	334
1346. Contests and appointments to conform to provisions as to other wills..	334

CHAPTER III.

OF EXECUTORS AND ADMINISTRATORS, THEIR LETTERS, BONDS, REMOVALS AND SUSPENSIONS.

ARTICLE I. Letters testamentary and of administration, how and to whom issued.	335
II. Form of letters	337
III. Order in which letters are granted.....	338
IV. Petition and contest for letters, and action thereon.....	339
V. Revocation of letters and proceedings therefor.....	341

CONTENTS.

CHAPTER VI. Oaths and bonds of executors and administrators.....	342
VII. Special administrators and their powers and duties.....	347
VIII. Wills found after letters of administration granted.....	350
IX. Disqualified judges and transfers of administration.....	351
X. Removals and suspensions in certain cases.....	353

ARTICLE I.

LETTERS TESTAMENTARY AND OF ADMINISTRATION, HOW AND TO WHOM ISSUED.

SECTION 1349. To whom letters on proved will to issue.....	335
1350. Who are incompetent as executors or administrators. Letters with will annexed to issue, when.....	335
1351. Interested parties may file objections.....	335
1352. Unmarried woman executrix or administratrix marrying, her authority ceases. Married woman named may be executrix but not administratrix.....	336
1353. Executor of an executor.....	336
1354. Letters of administration <i>durante minore ætate</i>	336
1355. Acts of a portion of executors valid.....	336
1356. Authority of administrators with will annexed. Letters, how issued..	337

ARTICLE II.

FORM OF LETTERS.

SECTION 1360. Form of letters testamentary	337
1361. Form of letters of administration with the will annexed.....	337
1362. Form of letters of administration.....	338

ARTICLE III.

ORDER IN WHICH LETTERS ARE GRANTED.

SECTION 1365. Order of persons entitled to administer. Partner not to administer...	338
1366. Preference of persons equally entitled.....	338
1367. In discretion of court to appoint administrator, when.....	339
1368. When minor entitled, who appointed administrator.....	339

ARTICLE IV.

PETITION AND CONTEST FOR LETTERS, AND ACTION THEREON.

SECTION 1371. Applications, how made.....	339
1372. When granted.....	340
1373. Notice of application.....	340
1374. Contesting applications.....	340
1375. Hearing of application.....	340
1376. Evidence of notice.....	340
1377. Grant to any applicant.....	340
1378. What proofs must be made before granting letters of administration..	341
1379. Letters may be granted to others than those entitled.....	341

CONTENTS.

xlix

ARTICLE V.

REVOCATION OF LETTERS AND PROCEEDINGS THEREFOR.

SECTION 1383. Revocation of letters of administration.....	341
1384. When petition filed, citation to issue.....	342
1385. Hearing of petition for revocation.....	342
1386. Prior rights of relatives entitles them to revoke prior letters.....	342

ARTICLE VI.

OATHS AND BONDS OF EXECUTORS AND ADMINISTRATORS.

SECTION 1389. Administrator or executor to take oath. Letters and bond to be recorded.....	343
1390. Bond of administrators, form and requirements of.....	343
1391. Each, of more than one administrator, to give separate bonds.....	344
1392. Several recoveries may be had on same bond.....	344
1393. Bonds, and justification of sureties on. Must be approved.....	344
1394. Citation and requirements of judge on deficient bond. Additional security.....	344
1395. Right ceases, when.....	345
1396. When bond may be dispensed with.....	345
1397. Petition showing failing sureties and asking for further bonds.....	345
1398. Citation to executor, etc., to show cause against such application.....	346
1399. Further security may be ordered.....	346
1400. Neglecting to obey order.....	346
1401. Suspending powers of executor, etc.	346
1402. Further security ordered without application of party in interest.....	346
1403. Release of sureties.....	347
1404. New sureties.....	347
1405. Neglect to give new sureties forfeits letters.....	347
1406. Applications to be determined out of term time.....	347

ARTICLE VII.

SPECIAL ADMINISTRATORS AND THEIR POWERS AND DUTIES.

SECTION 1411. Special administrator, when appointed.....	348
1412. Special letters may be issued out of term time.....	348
1413. Preference given to persons entitled to letters.....	348
1414. Special administrator to give bond and take oath.....	348
1415. Duties of special administrator.....	349
1416. When letters testamentary or of administration are granted special administrator's powers cease.....	349
1417. Special administrator to render account.....	349
1418. Remaining administrator or executor to continue when his colleagues are disqualified.....	349
1419. Who to act when all acting were incompetent.....	349

CONTENTS.

ARTICLE VIII.

WILLS FOUND AFTER LETTERS OF ADMINISTRATION GRANTED, AND MISCELLANEOUS PROVISIONS.

SECTION 1423. On proof of will, after grant of letters of administration, letters revoked	350
1424. Power of executor in such a case.....	350
1425. Executor or administrator may resign, when. Court to appoint successor. Liability of out-goer.....	350
1426. All acts of executor, etc., valid until his power is revoked.	351

ARTICLE IX.

DISQUALIFIED JUDGES AND TRANSFERS OF ADMINISTRATORS.

SECTION 1430. When judge not to act.....	351
1431. Judge being disqualified, proceedings to be transferred, and where....	352
1432. Transfer not to change right to administer. Re-transfer, how made...	352
1433. When proceedings to be returned to original court.....	353

ARTICLE X.

REMOVALS AND SUSPENSIONS IN CERTAIN CASES.

SECTION 1436. Suspension of powers of executor.....	353
1437. Executor to have notice of his suspension, and to be cited to appear...	354
1438. Any party interested may appear on hearing.....	354
1439. Notice to absconding executors and administrators..	354
1440. May compel attendance.....	354

CHAPTER VI.

OF THE INVENTORY AND COLLECTION OF THE EFFECTS OF DECEDENTS.

ARTICLE I. Inventory, appraisement and possession of estate.....	355
II. Embezzlement and surrender of property of estate.....	359

ARTICLE I.

INVENTORY, APPRAISEMENT AND POSSESSION OF ESTATE.

SECTION 1443. Inventory to be returned, including the homestead.....	355
1444. Appraisement and pay of appraisers.....	355
1445. Oath of appraisers and inventory, how made.....	355
1446. Inventory to account for moneys. If all money, no appraisement necessary.....	356
1447. Effect of naming a debtor executor.....	356
1448. Discharge or bequest of debt against executor.....	356
1449. To make oath to inventory.....	357
1450. Letters may be revoked for neglect of administrator.....	357
1451. Inventory of after discovered property.....	357
1452. Administrator and executor to possess real and personal estate.....	357

CONTENTS.

li

SECTION 1453. Executor or administrator to deliver real estate to heirs or devisees at the end of ten months, unless there are debts to be satisfied.....	358
1454. Personal estate first chargeable. Real estate, when to be sold.....	358

ARTICLE II.

EMBEZZLEMENT AND SURRENDER OF PROPERTY OF THE ESTATE.

SECTION 1458. Embezzling estate before grant of letters testamentary.....	359
1459. Citation to person suspected to have embezzled estate, etc.....	359
1460. Refusal to obey citation, penalty for, and for embezzlement. May be compelled to disclose by imprisonment. Liable for double damages	359
1461. Persons entrusted with estate of decedent may be cited to account.....	360

CHAPTER V.

OF THE PROVISION FOR THE SUPPORT OF THE FAMILY, AND OF THE HOMESTEAD.

ARTICLE I. Of the provision for the support of the family.....	361
II. Of the homestead.....	364

ARTICLE I.

OF THE PROVISION FOR THE SUPPORT OF THE FAMILY.

SECTION 1464. Widow and minor children may remain in decedent's house, etc.....	361
1465. All property exempt from execution to be set apart for use of family...	361
1466. May make extra allowance.....	362
1467. Payment of allowance.....	362
1468. Property set apart, how apportioned between widow and children.....	363
1469. Estates less than fifteen hundred dollars to go to wife and child; those less than three thousand to be summarily administered.....	363
1470. When all property to go to children.....	364

ARTICLE II.

OF THE HOMESTEAD.

SECTION 1474. Rights of survivor to homestead.....	364
1475. Selected and recorded homestead set off to person entitled. Subsisting liens to be paid by solvent estate.....	365
1476. Appraisers to carve out of the original exceeding five thousand dollars in value, a homestead, and report the same.....	365
1477. Report of the appraisers. Majority and minority, which may be confirmed.....	365
1478. Day to be set for confirming or rejecting the report of the appraisers. Appeal	366
1479. If report rejected, other appraisers appointed. If again rejected, partition suit to be brought.....	366
1480. Instead of dividing the homestead, who may take a deed thereof at appraised value.....	366
1481. If no homestead is selected and recorded prior to death of decedent, one may be petitioned for.....	367

CONTENTS.

SECTION 1482. Court to direct partition suit in the district court, when. Proceedings thereon.....	367
1483. If property is common or separate, court to cause appraisement and admeasurement to be made.....	367
1484. New appraisement, when ordered. Instead of deeding property at appraised value, public sale to be ordered, when.....	368
1485. Costs, to whom chargeable. Persons succeeding to rights of homestead owners have all their powers and rights.....	368
1486. Who succeeds to unmarried person's homestead.....	368

CHAPTER VI.

OF CLAIMS AGAINST THE ESTATE.

SECTION 1491. Notice to creditors. Additional notice.....	370
1492. Copy and proof of notice to be filed and order made.....	370
1493. Time within which claims against an estate must be presented.....	370
1494. Claims to be sworn to, and when allowed, to bear same interest as judgments	371
1495. Probate judge may present claim, and action thereon.....	371
1496. Allowance and rejection of claims.....	372
1497. Approved claims or copies to be filed. Claims secured by liens may be described. Lost claims.....	372
1498. Rejected claims to be sued for within three months.....	373
1499. Claims barred by statute of limitations. When and who probate judge may examine.....	373
1500. Claims must be presented before suit.....	373
1501. Time of limitation.....	373
1502. Claims in action pending at time of decease.....	374
1503. Allowance of claim in part.....	374
1504. Effect of judgment against executor.....	374
1505. Execution not to issue after death. If one is levied the property may be sold.....	374
1506. What judgment is not a lien on real property of estate.....	375
1507. May refer doubtful claims. Effect of referee's allowance or rejection..	375
1508. Trial by referee, how confirmed and its effect.....	376
1509. Liability of executor, etc., for costs.....	376
1510. Claims of executor, etc., against estate.....	376
1511. Executor neglecting to give notice to creditors, to be removed.....	376
1512. Executor to return statement of claims.....	376

CHAPTER VII.

OF SALES AND CONVEYANCES OF PROPERTY OF DECEDENTS.

ARTICLE I. Sales in general.....	377
II. Sales of personal property.....	378
III. Summary sales of mines and mining interests.....	380
IV. Sales of real estate, interests therein and confirmation thereof.....	382

CONTENTS.

lii

ARTICLE I.

SALES IN GENERAL.

SECTION 1517. No sales valid except by order of probate court.....	377
1518. Applications for orders of sale.....	377
1519. But one petition, order and sale must be had when it is possible to do so.....	378

ARTICLE II.

SALES OF PERSONAL PROPERTY.

SECTION 1522. Perishable and depreciating property to be sold.....	378
1523. Order to sell personal property.....	378
1524. Partnership interests and choses in action, how sold.....	379
1525. Order of sale, what to direct and what to be first sold.....	379
1526. Sale of personal property.....	379

ARTICLE III.

SUMMARY SALES OF MINES AND MINING INTERESTS.

SECTION 1529. Mines may be sold, how.....	380
1530. Petition for sale, who may file and what to contain.....	380
1531. Order to show cause, how made and on what notice.....	381
1532. Order of sale, when and how made.....	381
1533. Further proceedings to conform to articles two and four.....	381

ARTICLE IV.

SALES OF REAL ESTATE, INTERESTS THEREIN AND CONFIRMATION THEREOF.

SECTION 1536. To sell real estate, when.....	383
1537. Verified petition for sale, what to contain and to what it may refer.....	383
1538. Order to persons interested to appear.....	384
1539. Copy to be served, assent given, or publication made.....	384
1540. Hearing after proof of service. Presentation of claims.....	384
1541. Administrator, executor and witnesses may be examined.....	385
1542. To sell real estate or any part, when.....	385
1543. Order of sale, when to be made.....	385
1544. What the order of sale must contain. May be at public or private sale.....	386
1545. Interested persons may apply for order of sale. Form of petition.....	386
1546. To deliver copy of order to executor.....	386
1547. Notice of sale.....	387
1548. Time and place	387
1549. Private sale of real estate, how made, and notice. Bids, when and how received.....	387
1550. Ninety per cent. of appraised value must be offered.....	388
1551. Purchase money on sale on credit, how secured.....	388
1552. Hearing and setting aside sale, and when re-sale may be ordered.....	388
1553. May file objections, when and who.....	389
1554. When order of confirmation is to be made and when not.....	389
1555. Conveyances.....	390

SECTION 1556.	Order of confirmation, what to state	390
1557.	Sale may be postponed.....	390
1558.	Notice of postponement.....	391
1559.	Sale of real estate to pay legacies.....	391
1560.	Where payment of debts, etc., provided for by will.....	391
1561.	Sale without order. May require security.....	391
1562.	Where provision by will insufficient.....	392
1563.	Estate subject to debts, etc	392
1564.	Contribution among legatees.....	392
1565.	Contract for purchase of lands may be sold, how.....	392
1566.	Conditions of sale.....	393
1567.	Purchaser to give bond.....	393
1568.	Executor to assign contract.....	393
1569.	Sales by executors or administrators of lands under mortgage or lien.	393
1570.	The holder of the mortgage or lien may purchase the lands. His receipt to the amount of his claim a valid payment.....	394
1571.	Administrator and executor liable for misconduct in sale.....	395
1572.	Fraudulent sales.....	395
1573.	Limitation of actions for vacating sale, etc.....	395
1574.	To what cases preceding section not to apply	395
1575.	Account of sale to be returned.....	395
1576.	Executor, etc., not to be purchaser.....	396

CHAPTER VIII.

OF THE POWERS AND DUTIES OF EXECUTORS AND ADMINISTRATORS, AND OF THE MANAGEMENT OF ESTATES.

SECTION 1581.	Executors to take possession of the entire estate	396
1582.	Executors may sue and be sued for recovery of property.....	397
1583.	May maintain actions for waste, conversion and trespass.....	397
1584.	Executor and administrator may be sued for waste or trespass of decendent.....	397
1585.	Surviving partner to settle up business. Interest therein to be ap- praised. Account to be rendered.....	397
1586.	Probate judge may appoint receiver to take and settle partnership, when.....	398
1587.	Actions on bond of executor or administrator may be brought by another administrator.....	398
1588.	What executors are not parties to actions.....	398
1589.	May compound	398
1590.	Recovery of property fraudulently disposed of by testator.....	398
1591.	When executor to sue, as provided in preceding section.....	399
1592.	Disposition of estate recovered.....	399

CHAPTER IX.

OF THE CONVEYANCE OF REAL ESTATE BY EXECUTORS AND ADMINIS- TRATORS IN CERTAIN CASES.

SECTION 1597.	Executor to complete contracts for sale of real estate.....	400
1598.	Petition for executor to make conveyance, and notice of hearing.....	400

CONTENTS.

lv

SECTION 1599.	Interested parties may contest.....	400
1600.	Conveyances, when ordered to be made.....	400
1601.	Execution of conveyance and record thereof, how enforced	401
1602.	Rights of petitioner to enforce contract.....	401
1603.	Effect of conveyance.....	401
1604.	Effect of recording a copy of the decree.....	401
1605.	Recording decree does not supersede power of court to enforce it.....	401
1606.	Where party to whom conveyance to be made is dead.....	402
1607.	Decree may, and when it does, direct possession to be given, it must be surrendered.....	402

CHAPTER X.

OF ACCOUNTS RENDERED BY EXECUTORS AND ADMINISTRATORS, AND OF THE PAYMENT OF DEBTS.

ARTICLE	I.	Liabilities and compensation of executors and administrators.....	402
	II.	Accounting and settlements by executors and administrators.....	404
	III.	The payment of debts of the estate.....	409

ARTICLE I.

LIABILITIES AND COMPENSATION OF EXECUTORS AND ADMINISTRATORS.

SECTION 1612.	When executor or administrator personally liable	403
1613.	Executor to be charged with all estate, etc.....	403
1614.	Not to profit or lose by estate.....	403
1615.	Uncollected debts without fault.....	403
1616.	Compensation of the executor and administrator.....	403
1617.	Not to purchase claims against the estates.....	403
1618.	Executor's and administrator's commissions.. ..	404

ARTICLE II.

ACCOUNTING AND SETTLEMENTS BY EXECUTORS AND ADMINISTRATORS.

SECTION 1622.	To render an exhibit of receipts and disbursements, and claims allowed	405
1623.	Citation to account at third term.....	405
1624.	Petition for citation to render final or other account.....	405
1625.	Citation to account on application.....	405
1626.	Objections to account, who may file.....	406
1627.	Attachment for not obeying citation.....	406
1628.	To render accounts at expiration of term.....	406
1629.	Executor to account after his authority revoked.....	406
1630.	Revoking authority of executor, when.....	406
1631.	To produce and file vouchers, which remain in court.....	407
1632.	Vouchers for items less than twenty dollars, when excepted.....	407
1633.	Day of settlement to be appointed, and must give notice thereof.....	407
1634.	Final settlement, partition and distribution may be made at same time. Postponing order is notice.....	407
1635.	Interested party may file exceptions to account.....	408
1636.	All matters may be contested by the heirs. Hearing may be post- poned.....	408

CONTENTS.

SECTION 1637. Settlement of accounts to be conclusive, when and when not.....	408
1638. Proof of notice of settlement of accounts.....	409

ARTICLE III.

THE PAYMENT OF DEBTS OF THE ESTATE.

SECTION 1643. Order in which debts to be paid.....	409
1644. Where property insufficient to pay mortgage.....	409
1645. Estate insufficient, a dividend to be paid.....	410
1646. Funeral expenses and expenses of last sickness.....	410
1647. Order for payment of debts and discharge of the executor or administrator.....	410
1648. Provision for disputed and contingent claims.....	410
1649. After decree for payment of debts, executor personally liable to creditors.....	411
1650. Claims not included in order for payment of debts, how disposed of...	411
1651. Order for payment of legacies and extension of time.....	411
1652. Final account, when to be made.....	412
1653. Neglect to render final account, how treated.....	412

CHAPTER XI.

OF THE PARTITION, DISTRIBUTION AND FINAL SETTLEMENT OF ESTATES.

ARTICLE I. Partial distribution prior to final settlement.....	412
II. Distribution on final settlement.....	414
III. Partition of real estate and distribution.....	416
IV. Agents for absent interested parties, and final settlement.....	422

ARTICLE I.

PARTIAL DISTRIBUTION PRIOR TO FINAL SETTLEMENT.

SECTION 1658. Payment of legacies upon giving bonds.....	413
1659. Notice of application for legacies.....	413
1660. Executor or other person may resist application.....	413
1661. Decree prayed for to require bond, which must be given. May order whole or part of share to be delivered. Where partition necessary, how made. Costs.....	413
1662. Order for payment of bond, and suit thereon.....	414

ARTICLE II.

DISTRIBUTION ON FINAL SETTLEMENT.

SECTION 1665. Distribution of estate, how made and to whom.....	414
1666. What the decree must contain, and is final.....	415
1667. Distribution when decedent was not a resident of this state.....	415
1668. Decree to be made only after notice.....	416
1669. No distribution to be ordered till all taxes on personal property are paid.....	416

CONTENTS.

lvii

ARTICLE III.

PARTITION OF REAL ESTATE AND DISTRIBUTION.

SECTION 1672. Estate in common. Commissioners.....	417
1673. Partition of property held by estate and stranger in common, or as joint tenants or coparceners, how made.....	417
1674. Probate court, instead of making partition, may direct action therefor to be brought in the district court.....	418
1675. Partition and notice thereof, and the time of filing petition.....	418
1676. Estate in different counties, how divided.....	418
1677. Partition may be made although some of the heirs, etc., have parted with their interest.....	419
1678. Shares to be set out by metes and bounds.....	419
1679. Whole estate may be assigned to one, in certain cases.....	419
1680. Payments for equality of partition, by whom and how.....	420
1681. Estate may be sold.....	420
1682. Division by partition binding. When action may be brought in district court.....	420
1683. To give notice to all persons and guardians before partition. Duties of commissioners.....	421
1684. To make report, and partition to be recorded.....	421
1685. When commissioners to make partition are not necessary.....	421
1686. Advancements made to heirs.....	421

ARTICLE IV.

AGENTS FOR ABSENT INTERESTED PARTIES, AND FINAL SETTLEMENT.

SECTION 1691. Court may appoint agent to take possession for absentees.....	422
1692. Agent to give bond, and his compensation.....	422
1693. Unclaimed estate, how disposed of.....	422
1694. When real and personal property of absentee to be sold.....	423
1695. Liability of agent on his bond.....	423
1696. Certificate to claimant.....	423
1697. Final settlement, decree and discharge.....	423
1698. Discovery of property.....	424

CHAPTER XII.

OF ORDERS, DECREES, PROCESS, MINUTES, RECORDS, TRIALS AND APPEALS.

SECTION 1704. Orders and decrees to be entered in minutes.....	425
1705. How often publication to be made.....	425
1706. Recorded decree or order to impart notice from date of filing.....	425
1707. Service of personal notice.....	425
1708. Citation, how served. Proofs of publication, how made.....	426
1709. Citation to be served five days before return.....	426
1710. Clerk of probate court may administer oaths and issue citations.....	426
1711. Writs to be signed and sealed.....	426

SECTION 1712. One description of real estate sought to be sold being published, is sufficient for all purposes.....	426
1713. District court practice applicable.....	427
1714. Issues joined in probate court, how tried and disposed of.....	427
1715. Court to try case when no jury is demanded. How and what issues to be tried.....	427
1716. Court to appoint attorney for minor or absent heirs, devisees, legatees or creditors, when, and what compensation he is to receive.....	427
1717. Decree relating to homestead, and effect thereof.....	428
1718. Appeals may be taken to the supreme court, from what.....	428
1719. Costs, by whom paid in certain cases.....	429
1720. Executor, administrator or guardian to be removed when committed for contempt, and another appointed.....	429

CHAPTER XIII.

OF PUBLIC ADMINISTRATOR.

SECTION 1726. What estates to be administered by public administrator.....	
1727. Public administrator to obtain letters, when and how. His bond and oath.....	430
1728. Duty of persons in whose house any stranger dies.....	430
1729. Must return inventory and administer estates according to this title...	431
1730. When another person is appointed administrator or executor, public administrator to deliver up the estate	431
1731. Civil officers to give notice of waste to public administrator.....	431
1732. Suits for property of decedents.....	431
1733. Order to examine party charged with embezzling estate.....	431
1734. Punishment for refusing to attend.....	432
1735. Order on public administrator to account.....	432
1736. Every six months to make and publish return of condition of estate..	432
1737. Not to be interested in the payments for or on account of estates in his hands.....	432
1738. When to settle with county clerk, and how unclaimed estate disposed of	433
1739. Proceedings, how and by whom instituted, against public administrator failing to pay over money as ordered.....	433
1740. Fees of officers, when and by whom paid.....	433
1741. Public administrator to administer oaths.....	433
1742. Preceding chapters applicable to public administrator.....	433

CHAPTER XIV.

OF GUARDIAN AND WARD.

ARTICLE I. Guardians of minors.....	434
II. Guardians of insane and incompetent persons.....	438
III. The powers and duties of guardians.....	439
IV. The sale of property and disposition of proceeds.....	441
V. Non-resident guardians and wards.....	446
VI. General and miscellaneous provisions.....	448

CONTENTS.

lix

ARTICLE I.

GUARDIANS OF MINORS.

SECTION 1747. Probate judge to appoint guardians, when, and on what petition.....	434
1748. When minor may nominate guardian ; when not.....	435
1749. When appointment may be made by judge, when minor is over four- teen.....	435
1750. Nomination by minors after arriving at fourteen.....	435
1751. Minor having no father or mother.....	435
1752. Powers and duties of guardian.....	435
1753. Bond of guardian, conditions of.....	436
1754. Probate judge may insert conditions in order appointing guardian....	436
1755. Letters of guardianship and bond of guardian to be recorded.....	437
1756. Maintenance of minor out of income of his own property.....	437
1757. Guardian to give bond. Powers limited.....	437
1758. Power of courts to appoint guardians and next friend not impaired...	437

ARTICLE II.

GUARDIANS OF INSANE AND INCOMPETENT PERSONS.

SECTION 1763. Guardians of insane and other incompetent persons.....	438
1764. Appointment by probate judge after hearing.....	438
1765. Powers and duties of such guardians.. ..	438

ARTICLE III.

THE POWERS AND DUTIES OF GUARDIANS.

SECTION 1768. Guardian to pay debts of ward out of ward's estate.....	439
1769. Guardian to recover debts due his ward and represent him.....	439
1770. Guardian to manage his estate, maintain ward and sell real estate....	439
1771. Maintenance, support and education of ward, how enforced.	440
1772. May assent to a partition of real estate.....	440
1773. Guardian to return inventory of estate of ward. Appraisers to be appointed. Like proceedings when other property acquired.....	440
1774. Settlements of guardians.....	441
1775. Allowance of accounts of joint guardians.....	441
1776. Expenses and compensation of guardians.....	441

ARTICLE IV.

THE SALE OF PROPERTY AND DISPOSITION OF PROCEEDS.

SECTION 1780. May sell property in certain cases.....	442
1781. Sale of real estate to be made upon order of court.....	442
1782. Application of proceeds of sales.....	442
1783. Investment of proceeds of sales.....	443
1784. Order for sale, how obtained.....	443
1785. Notice to next of kin, how given.....	443
1786. Copy of order to be served, published or consent filed.....	443
1787. Hearing of application.....	444
1788. Who may be examined on such hearing.....	444
1789. Costs to be awarded, to whom.....	444

CONTENTS.

SECTION 1790. Order of sale, to specify what.....	444
1791. Bond before selling.....	444
1792. All proceedings for sales of property by guardians to conform to chapter seven of this title.....	445
1793. Limit of order of sale.....	445
1794. Conditions of sales of real estate of minor heirs. Bond and mortgage to be given for deferred payments.....	445
1795. Probate court may order the investment of money of the ward.....	445

ARTICLE V.

NON-RESIDENT GUARDIANS AND WARDS.

SECTION 1800. Guardians of non-resident persons.....	446
1801. Powers and duties of guardians appointed under preceding section....	446
1802. Such guardians to give bonds.....	446
1803. To what guardianship shall extend.....	446
1804. Removal of non-resident ward's property.....	447
1805. Proceedings on such removal.....	447
1806. Discharge of person in possession.....	447

ARTICLE VI.

GENERAL AND MISCELLANEOUS PROVISIONS.

SECTION 1810. Examination of persons suspected of defrauding wards or concealing property	448
1811. Removal and resignation of guardian, and surrender of estate.....	448
1812. Guardianship, how terminated.....	449
1813. New bond, when required.....	449
1814. Guardian's bond to be filed. Action on.....	449
1815. Limitation of actions on guardian's bond.....	449
1816. Limitation of actions for the recovery of property sold.....	450
1817. More than one guardian of a person may be appointed.....	450
1818. Power of probate judge in chambers.....	450
1819. Provisions of section ten hundred and fifty-seven apply to guardians..	450

PART IV.

OF EVIDENCE.

GENERAL DEFINITIONS AND DIVISIONS.

SECTION 1823. Definition of evidence.....	457
1824. Definition of proof.....	457

CONTENTS.

lxi

SECTION	1825. Definition of law of evidence.....	457
	1826. The degree of certainty required to establish facts.....	458
	1827. Four kinds of evidence specified.....	458
	1828. Several degrees of evidence specified.....	459
	1829. Original evidence defined.....	459
	1830. Secondary evidence defined.....	459
	1831. Direct evidence defined.....	459
	1832. Indirect evidence defined.....	459
	1833. Primary evidence defined.....	459
	1834. Partial evidence defined.....	459
	1835. Satisfactory evidence defined.....	460
	1836. Indispensable evidence defined.....	460
	1837. Conclusive evidence defined.....	460
	1838. Cumulative evidence defined.....	460
	1839. Corroborative evidence defined.....	460

TITLE I.

OF THE GENERAL PRINCIPLES OF EVIDENCE.

SECTION	1844. One witness sufficient to prove a fact.....	461
	1845. Testimony confined to personal knowledge.....	461
	1846. Testimony to be in presence of persons affected.....	461
	1847. Witness presumed to speak the truth.....	461
	1848. One person not affected by acts of another.....	461
	1849. Declarations of predecessor in title evidence.....	462
	1850. Declarations which are a part of the transaction.....	462
	1851. Evidence relating to third person.....	462
	1852. Declaration of decedent evidence of pedigree.....	462
	1853. Declaration of decedent evidence against his successor in interest.....	462
	1854. When part of a transaction proved, the whole is admissible.....	462
	1855. Contents of writing, how proved.....	463
	1856. An agreement reduced to writing deemed the whole.....	463
	1857. Construction of language relates to place where used.....	463
	1858. Construction of statutes and instruments, general rule.....	464
	1859. The intention of the legislature or parties.....	464
	1860. The circumstances to be considered.....	464
	1861. Terms to be construed in their general acceptation.....	464
	1862. Written words control those printed in a blank form.....	464
	1863. Persons skilled may testify to decipher characters.....	464
	1864. Of two constructions, which preferred.....	465
	1865. A written instrument construed as understood by parties.....	466
	1866. Construction in favor of natural right preferred	466
	1867. Material allegation only to be proved.....	466
	1868. Evidence confined to material allegation.....	466
	1869. Affirmative only to be proved.....	466
	1870. Facts which may be proved on trial.....	467

TITLE II.

OF THE KINDS AND DEGREES OF EVIDENCE.

CHAPTER	I. Knowledge of the court.....	468
	II. Witnesses.....	469
	III. Writings	471
	IV. Material objects presented to the senses, other than writings.....	484
	V. Indirect evidence.....	485
	VI. Indispensable evidence.....	489
	VII. Conclusive and unanswerable evidence.....	492

CHAPTER I.

KNOWLEDGE OF THE COURT.

SECTION 1875.	Certain facts of general notoriety assumed to be true. Specification of such facts.....	468
---------------	---	-----

CHAPTER II.

WITNESSES.

SECTION 1878.	Witnesses defined.....	469
1879.	All persons capable of perception and communication may be witnesses	469
1880.	Persons who cannot testify.....	470
1881.	Persons in certain relations to parties prohibited.....	470
1882.	When privileged persons must testify.....	471
1883.	Judge or a juror may be witness	471
1884.	When an interpreter to be sworn.....	471

CHAPTER III.

WRITINGS.

ARTICLE	I. Writings in general	472
	II. Public writings.....	472
	III. Private writings.....	480

ARTICLE I.

WRITINGS IN GENERAL.

SECTION 1887.	Writings, public and private.....	472
1888.	Public writings defined.....	472
1889.	All others private.....	472

CONTENTS.

lxiii

ARTICLE II.

PUBLIC WRITINGS.

Section	1892.	Every citizen entitled to inspect and copy public writings.....	473
	1893.	Public officers bound to give copies.....	473
	1894.	Four kinds of public writings.....	473
	1895.	Laws, written or unwritten.....	473
	1896.	Written laws defined.....	473
	1897.	Constitution and statutes.....	473
	1898.	Public and private statutes defined.....	474
	1899.	Unwritten law defined.....	474
	1900.	Books containing laws presumed to be correct.....	474
	1901.	Public seal authenticates a law or document.....	474
	1902.	Other evidence of laws of other states.....	474
	1903.	Recitals in statutes, how far evidence.....	474
	1904.	Judicial record defined.....	475
	1905.	Record, how authenticated as evidence.....	475
	1906.	Record of a foreign country, how authenticated.....	475
	1907.	Oral evidence of a foreign record.....	475
	1908.	Effect of a judgment upon rights in various cases.....	476
	1909.	Effect of other judicial orders, when conclusive.....	476
	1910.	Where parties are to be deemed the same.....	476
	1911.	What deemed adjudged in a judgment.....	476
	1912.	Where sureties bound, principal is also.....	477
	1913.	Record of another state, its effect.....	477
	1914.	Record of a court of admiralty.....	477
	1915.	Effect of a foreign judgment.....	477
	1916.	Manner of impeaching a record.....	477
	1917.	The jurisdiction necessary in a judgment.....	477
	1918.	Manner of proving other official documents.....	478
	1919.	Public record of private writing evidence.....	479
	1920.	Entries in official books primary evidence.....	479
	1921.	Justice's judgment in other states, how proved.....	479
	1922.	Same.....	479
	1923.	Contents of other official certificates.....	479
	1924.	Provisions in relation to states apply to territories.....	480

ARTICLE III.

PRIVATE WRITINGS.

Section	1929.	Private writings classified.....	480
	1930.	Seal defined.....	480
	1931.	Manner of making it.....	480
	1932.	Effect of a seal.....	481
	1933.	Execution of an instrument defined.....	481
	1934.	Compromise of a debt without seal good.....	481
	1935.	Subscribing witness defined.....	481
	1936.	Books, maps, etc., how far evidence.....	481
	1937.	Original writing to be produced or accounted for.....	481
	1938.	When in possession of adverse party, notice to be given.....	482
	1939.	Writings called for and inspected may be withheld.....	482
	1940.	Where there is a subscribing witness, the proof.....	482

SECTION 1941. Other witnesses may also testify.....	482
1942. When evidence of execution not necessary.....	482
1943. Evidence of handwriting.....	483
1944. Allowed by comparison.....	483
1945. Same.....	483
1946. Entries of decedents evidence in specified cases.....	483
1947. Copies of entries also allowed.....	483
1948. Private writings acknowledged and certified.....	483
1949. County clerks to keep private papers deposited.....	484
1950. Public records not to be carried about.....	484

CHAPTER IV.

MATERIAL OBJECTS PRESENTED TO THE SENSES, OTHER THAN WRITINGS.

SECTION 1954. Material objects.....	484
-------------------------------------	-----

CHAPTER V.

INDIRECT EVIDENCE, INFERENCES AND PRESUMPTIONS.

SECTION 1957. Indirect evidence classified.....	485
1958. Inference defined.....	485
1959. Presumption defined.....	485
1960. When an inference arises.....	485
1961. Presumptions may be controverted, when.....	485
1962. Specification of conclusive presumptions.....	485
1963. All other presumptions may be controverted.....	486

CHAPTER VI.

INDISPENSABLE EVIDENCE.

SECTION 1967. Indispensable evidence, what.....	489
1968. To prove usage, perjury and treason, more than one witness required..	489
1969. Will to be in writing.....	489
1970. How revoked	490
1971. Transfer of real property to be in writing.....	490
1972. Last section not to extend to certain cases.....	490
1973. Agreement not in writing, when invalid.....	490
1974. Representation of credit by writing.....	491

CHAPTER VII.

CONCLUSIVE OR UNANSWERABLE EVIDENCE.

SECTION 1978. Conclusive or unanswerable evidence.....	492
--	-----

CONTENTS.

lxv

TITLE III.

OF THE PRODUCTION OF EVIDENCE.

CHAPTER	I. By whom to be produced.....	492
	II. Means of production.....	493
	III. Manner of production.....	496

CHAPTER I.

BY WHOM TO BE PRODUCED.

SECTION	1981. Evidence to be produced, by whom.....	492
	1982. Writing altered, who to explain.....	492

CHAPTER II.

MEANS OF PRODUCTION.

SECTION	1985. Subpœna for witness defined.....	493
	1986. Subpœna, how issued.....	493
	1987. Subpœna, how served.....	494
	1988. How, if witness be concealed.....	494
	1989. When a witness is compelled to attend.....	494
	1990. Person present compelled to testify.....	494
	1991. Disobedience, how punished.....	494
	1992. Forfeiture therefor.....	495
	1993. Warrant may issue to bring witness, when.....	495
	1994. Contents of warrant.....	495
	1995. If witness be a prisoner, how brought.....	495
	1996. On whose motion.....	495
	1997. How examined.....	495

CHAPTER III.

MANNER OF PRODUCTION.

ARTICLE	I. Mode of taking the testimony of witnesses.....	496
	II. Affidavits.....	497
	III. Depositions.....	498
	IV. Manner of taking depositions out of the state.....	499
	V. Manner of taking depositions in the state.....	500
	VI. General rules of examination.....	503

ARTICLE I.

MODE OF TAKING THE TESTIMONY OF WITNESSES.

SECTION	2002. Testimony, in what mode taken.....	496
	2003. Affidavit defined.....	496

SECTION 2004.	A deposition defined.....	496
2005.	Oral examination defined.....	496
2006.	Deposition, how taken.....	497

ARTICLE II.

AFFIDAVITS.

SECTION 2009.	Affidavits and depositions, how taken.....	497
2010.	Evidence of publication, what.....	497
2011.	Where filed.....	498
2012.	Affidavits to be used in this state, before whom may be taken in this state.....	498
2013.	If made in another state of the United States, before whom taken.....	498
2014.	If made in a foreign country, before whom taken.....	498
2015.	Certificate of the clerk, if taken before a judge of a court out of this state.....	498

ARTICLE III.

DEPOSITIONS.

SECTION 2019.	Deposition, when used.....	498
2020.	Testimony of a witness out of the state, when taken.....	499
2021.	In the state, when taken.....	499

ARTICLE IV.

MANNER OF TAKING DEPOSITIONS OUT OF THE STATE.

SECTION 2024.	Testimony of witness out of state taken upon commission issued under seal, upon notice. To whom to issue.....	499
2025.	Proper interrogatories may be prepared, or may be waived by the parties.....	500
2026.	Authorities and duties of commissioner.....	500
2027.	Trial, when postponed for reason of non-return of commission.....	500
2028.	Deposition, by whom used.....	500

ARTICLE V.

MANNER OF TAKING DEPOSITIONS IN THE STATE.

SECTION 2031.	Depositions may be taken before a judge, etc., upon notice to the adverse party.....	501
2032.	Manner of taking depositions. May be used by either party on the trial.....	501
2033.	When deposition excluded.....	502
2034.	A deposition once taken may be read at any time.....	502
2035.	Deposition in this state to be used in other states.....	502
2036.	How to procure witness upon commission.....	502
2037.	How, if no commission.....	502
2038.	Deposition, how taken.....	503

CONTENTS.

lxvii

ARTICLE VI.

GENERAL RULES OF EXAMINATION.

SECTION 2042.	Order of proof, how regulated..... ..	503
2043.	Witnesses not under examination may be excluded.....	503
2044.	Court may control mode of interrogation..... ..	503
2045.	Direct and cross-examination defined.....	504
2046.	Leading question defined.....	504
2047.	When witness may refresh memory from notes.....	504
2048.	Cross-examination, as to what..... ..	504
2049.	Party producing not allowed to lead witness.....	505
2050.	Witness, how examined. When re-examined.....	505
2051.	How impeached.....	505
2052.	Same.....	505
2053.	Evidence of good character, when allowed.....	505
2054.	Writing shown to witness may be inspected by adverse party.....	506

TITLE IV.

OF THE EFFECT OF EVIDENCE.

SECTION 2061.	Jury judges of effect of evidence, but to be instructed on certain points	506
----------------------	---	-----

TITLE V.

OF THE RIGHTS AND DUTIES OF WITNESSES.

SECTION 2064.	Witnesses bound to attend when subpoenaed.....	507
2065.	Witnesses bound to answer questions.....	507
2066.	Right of witnesses to protection..... ..	507
2067.	Witnesses protected from arrest when attending, or going or returning	507
2068.	Arrest to be made void, and party making arrest liable, etc.....	508
2069.	To make affidavit if arrested.....	508
2070.	Court to discharge witness from arrest.....	508

TITLE VI.

OF EVIDENCE IN PARTICULAR CASES, AND MISCELLANEOUS AND GENERAL PROVISIONS.

CHAPTER I.	Evidence in particular cases.....	509
II.	Proceedings to perpetuate testimony.....	511
III.	Administration of oaths and affirmations.....	513
IV.	General provisions.....	514

CONTENTS.

CHAPTER I.

EVIDENCE IN PARTICULAR CASES.

SECTION 2074. An offer equivalent to payment.....	509
2075. Whoever pays entitled to receipt.....	509
2076. Objections to tender must be specified.....	509
2077. Rules for construing description of lands.....	510
2078. Compromise offer of no avail, but admission of facts may be shown...	510
2079. In action for divorce, admission not sufficient.....	510

CHAPTER II.

PROCEEDINGS TO PERPETUATE TESTIMONY.

SECTION 2083. Evidence may be perpetuated.....	511
2084. Manner of application for order.....	511
2085. Notice of time and place to be given.....	511
2086. Manner of taking the deposition.....	512
2087. Deposition to be filed.....	512
2088. When the evidence may be produced.....	512
2089. Effect of the deposition	512

CHAPTER III.

ADMINISTRATION OF OATHS AND AFFIRMATIONS.

SECTION 2093. Judicial and certain officers authorized to administer oaths.....	513
2094. Form of ordinary oath to a witness.....	513
2095. Another form.....	513
2096. Form may be varied to suit witness' belief.....	513
2097. Same.....	513
2098. Any person who prefers it may declare or affirm.....	514

CHAPTER IV.

GENERAL PROVISIONS.

SECTION 2101. Questions of fact to be decided by the jury, and the evidence addressed to them.....	514
2102. Questions of law addressed to the court.....	514
2103. Questions of fact by court or referees.....	514
2104. Repealing section.....	514

CODE OF CIVIL PROCEDURE.

IN FOUR PARTS.

T H E
REVISED LAWS

OF THE
STATE OF CALIFORNIA ;

IN FOUR CODES :

Political, Civil, Civil Procedure and Penal.

CODE OF CIVIL PROCEDURE.

TITLE OF VOLUME.

SECTION 1. This volume shall be known as **THE CODE** Title and divisions of this volume.
OF CIVIL PROCEDURE OF CALIFORNIA, and is divided into
four parts, as follows :

PART I. Of Courts of Justice.

II. Of Civil Actions.

III. Of Special Proceedings of a Civil Nature.

IV. Of Evidence.

THE
CODE OF CIVIL PROCEDURE
OF
CALIFORNIA.

PRELIMINARY PROVISIONS.

- SECTION** 2. When this code takes effect.
3. Not retroactive.
 4. Rule of construction of this code.
 5. Provisions similar to existing laws, how construed.
 6. Actions, etc., not affected by this code.
 7. Limitations shall continue to run.
 8. Certain terms used in this code defined.
 9. Words and phrases.
 10. Joint authority.
 11. Computation of time.
 12. "Seal" defined.
 13. Judicial remedies defined.
 14. Division of judicial remedies.
 15. Action defined.
 16. Special proceeding defined.
 17. Division of actions.
 18. Civil actions arise out of obligations or injuries.
 19. Obligation defined.
 20. Division of injuries.
 21. Injuries to property.
 22. Injuries to the person.
 23. Civil action, by whom prosecuted.
 24. Criminal actions.
 25. Civil and criminal remedies not merged.

SEC. 2. This code takes effect at twelve o'clock noon, on the first day of July, eighteen hundred and seventy-two. When this code takes effect.

SEC. 3. No part of it is retroactive, unless expressly so declared. Not retroactive.

Rule of construction of this code.

SEC. 4. The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. Its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice.

NOTE.—This section, in our opinion, will obviate much of the difficulty under which courts have labored, and will render the code, instead of a rigid and unbending statute, as our practice act has been construed by some, a rule of procedure susceptible of easy adaption to the purposes of justice, which it alone has in view.

Provisions similar to existing laws, how construed.

SEC. 5. The provisions of this code, so far as they are substantially the same as existing statutes, must be construed as continuations thereof and not as new enactments.

NOTE.—The political code contains a general provision that the repeal of existing statutes shall not revive any law heretofore repealed or suspended, nor any office heretofore abolished, and therefore such a provision has not been incorporated herein.

Actions, etc., not affected by this code, except, etc.

SEC. 6. No action or proceeding commenced before this code takes effect, and no right accrued, is affected by its provisions, but the proceedings therein may be conformed to the requirements of this code as far as applicable.

Limitations shall continue to run.

SEC. 7. When a limitation or period of time prescribed in any existing statute for acquiring a right or barring a remedy, or for any other purpose, has begun to run before this code goes into effect, and the same or similar limitation is prescribed in this code, the time of limitation continues to run, and has like effect as if the whole period had begun and ended after its adoption.

NOTE.—Necessary because the statutes of limitations for civil actions and proceedings will be embodied in this code, under the second subdivision thereof.

Certain terms used in this code defined.

SEC. 8. Whenever the terms mentioned in this section are employed in this code, they are deemed to be employed in the senses hereafter affixed to them, except where a different sense plainly appears:

“Signature”

1. The term “signature” includes any name, mark or sign written with intent to authenticate any instrument or writing.

2. The term "writing" includes both printing and writing. "Writing."

3. The term "land" and the phrases "real estate" and "real property," includes lands, tenements and hereditaments, and all rights thereto and interests therein. "Real estate," etc.

4. The words "personal property" include money, goods, chattels, evidence of debt, and "things in action." "Personal property"

5. The word "property" includes personal and real property. "Property."

6. The word "month" means a calendar month, unless otherwise expressed, and the word "year," and also the abbreviation "A. D." is equivalent to the expression "year of our Lord." "Month," "year," "A. D."

7. The word "oath" includes "affirmation" in all cases where an affirmation may be substituted for an oath; and in like cases the word "swear" includes the word "affirm." Every mode of oral statement under oath or affirmation is embraced by the term "testify," and every written one in the term "depose." "Oath" and "affirmation."

8. The word "state," when applied to the different parts of the United States, includes the district of Columbia and the territories, and the words "United States" may include the district and territories. "State."

9. Where the term "person" is used in this code to designate the party whose property may be the subject of any offence, it includes this state, any other state, government or country which may lawfully own any property within this state, and all public and private corporations or joint associations, as well as individuals. "Person," when used to denote owner of property.

10. The word "person" includes bodies politic and corporate. "Person."

11. The singular number includes the plural, and the plural the singular. Singular includes the plural.

12. Words used in the masculine gender comprehend, as well, the feminine and neuter. Masculine includes feminine and neuter.

13. Words used in the present tense include the future, but exclude the past. Present tense, how used.

14. The word "will" includes codicils. "Will."

15. The word "writ" signifies an order or precept in writing issued in the name of the people, or of a court or judicial officer. "Process" is a writ or summons issued in the course of judicial proceedings. "Writ." "Process."

Words and
phrases.

SEC. 9. Words and phrases are construed according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, are to be construed according to such peculiar and appropriate meaning.

Joint
authority.

SEC. 10. Words giving a joint authority to three or more public officers or other persons, are construed as giving such authority to a majority of them, unless it be otherwise expressed in the act giving the authority.

Computation
of time.

SEC. 11. The time in which any act provided by law is to be done, is computed by excluding the first day, and including the last, unless the last day is Sunday, and then it is also excluded.

"Seal"
defined.

SEC. 12. When the seal of a court or public officer, or officer, is required by law to be affixed to any paper, the word "seal" includes an impression of such seal upon the paper alone, as well as upon wax or a wafer affixed thereto.

Judicial
remedies
defined.

SEC. 13. Judicial remedies are such as are administered by the courts of justice or by judicial officers empowered for that purpose by the constitution and statutes of this state.

NOTE.—Introduced as a concise and convenient definition of judicial remedies.

Division of
judicial
remedies.

SEC. 14. These remedies are divided into two classes:
1. Actions; and,
2. Special proceedings.

Action
defined.

SEC. 15. An action is an ordinary proceeding in a court of justice, by which one party prosecutes another, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence.

Special
proceeding
defined.

SEC. 16. Every other remedy is a special proceeding.

Division of
actions.

SEC. 17. Actions are of two kinds:
1. Civil; and,
2. Criminal.

SEC. 18. A civil action arises out of—

1. An obligation.
2. An injury.

Civil actions
arise out of
obligations
or injuries.

SEC. 19. An obligation is a legal duty, by which one person is bound to the performance of an act towards another, and arises from—

1. The contract of the parties; or,
2. The operation of law.

Obligation
defined.

SEC. 20. An injury is of two kinds:

1. To the person; and,
2. To property.

Division of
injuries.

SEC. 21. An injury to property consists in depriving its owner of the benefit of it, which is done by taking, withholding, deteriorating or destroying it.

Injuries to
property.

SEC. 22. Every other injury is an injury to the person.

Injuries to
the person.

SEC. 23. A civil action is prosecuted by one party against another for the enforcement or protection of a right, or the redress or prevention of a wrong.

Civil action,
by whom
prosecuted.

SEC. 24. The PENAL CODE defines and provides for the prosecution of a criminal action.

Criminal
actions.

SEC. 25. When the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other.

Civil and
criminal
remedies
not merged.

PART I.

OF COURTS OF JUSTICE.

PART I.

OF COURTS OF JUSTICE.

TITLE I.

OF THEIR ORGANIZATION, JURISDICTION AND TERMS.

- CHAPTER I. *Of courts of justice in general.*
- II. *Of the court for the trial of impeachments.*
 - III. *Of the supreme court.*
 - IV. *Of the district courts.*
 - V. *Of the county courts.*
 - VI. *Of the probate court.*
 - VII. *Of the municipal criminal court of San Francisco.*
 - VIII. *Of justices' courts.*
 - IX. *Of police courts.*
 - X. *General provisions respecting courts of justice.*
-

CHAPTER I.

COURTS OF JUSTICE IN GENERAL.

- SECTION 30. The several courts of this state.
31. Courts of record.

SEC. 30. The following are the courts of justice of this state: The several courts.

1. The court for the trial of impeachments.
2. The supreme court.
3. The district courts.
4. The county courts.

5. The probate courts.
6. The municipal criminal court of San Francisco.
7. The justices' courts.
8. The police courts.

NOTE.—Based upon act of 1863 (Stat. 1863, p. 333), with the court for the trial of impeachments and the municipal criminal court of San Francisco added, and "police courts" substituted in the place of the sixth subdivision of that act, which reads "recorders' and other inferior municipal courts."

Courts of
record.

SEC. 31. The courts enumerated in the first six subdivisions of the preceding section are courts of record.

CHAPTER II.

OF THE COURT FOR THE TRIAL OF IMPEACHMENTS.

SECTION 34. Members of the court.

35. Jurisdiction.

36. Officers of the court.

37. Trial of impeachments provided for in penal code.

Members of
the court.

SEC. 34. The court for the trial of impeachments is composed of the members of the senate, or a majority of them.

Jurisdiction.

SEC. 35. The court has power to try impeachments, when presented by the assembly, of the governor, lieutenant-governor, secretary of state, controller, treasurer, attorney-general, surveyor-general, justices of the supreme court and judges of the district courts, for any misdemeanor in office.

Const. art. 4, § 18.

Officers of
the court.

SEC. 36. The clerk and officers of the senate are the clerk and officers of the court.

Trial of im-
peachment
provided for
in the penal
code.

SEC. 37. Proceedings on the trial of impeachments are provided for in the penal code.

NOTE.—See penal code, chapter 1, title II, part II.

CHAPTER III.

OF THE SUPREME COURT.

SECTION 40. Members of the court.

41. Chief justice.
42. Jurisdiction of two kinds.
43. Original jurisdiction.
44. Appellate jurisdiction.
45. May reverse, affirm or modify, etc., remittitur.
46. Number of judges necessary for the transaction of business.
47. Number to pronounce judgment.
48. Terms, when held. Additional terms. Opinions, etc., may be filed in vacation.
49. Terms, where held.

SEC. 40. The supreme court consists of a chief justice and four associate justices, elected at the judicial elections, and holding their offices for the term of ten years from the first day of January next after their election.

Members of
the court.

Const. art. 6, §§ 2, 3.

SEC. 41. The justice having the shortest term to serve is the chief justice.

Chief justice

NOTE.—The act of April 20th, 1863 (Stat. 1863, p. 333), section 3, declares that “the justice who has been longest in commission shall be chief justice.” The section we present departs from this language, and conforms to that of the constitution (art. 6, § 3).

SEC. 42. The jurisdiction of this court is of two kinds:
1. Original; and,
2. Appellate.

Jurisdiction
of two kinds.

SEC. 43. Its original jurisdiction extends to the issuance of writs of mandamus, certiorari, prohibition, habeas corpus and all writs necessary to the exercise of its appellate jurisdiction.

Original
jurisdiction.

NOTE.—Const. art. 6, § 4; Statutes of 1863, p. 334. The provisions, that the writ of habeas corpus may be issued by each of the justices, and made returnable before the court or any justice thereof, or before any district court, etc., relates rather to practice than power of the court, and has been inserted in the penal code, under the chapter relating to habeas corpus, part II, title XII.

Appellate
jurisdiction.

Sec. 44. Its appellate jurisdiction extends—

1. To all civil actions for relief formerly given in courts of equity.
2. To all civil actions in which the subject of litigation is not capable of pecuniary compensation.
3. To all civil actions in which the subject of litigation is capable of pecuniary compensation, which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars.
4. To all special proceedings.
5. To all cases arising in the probate courts; and,
6. To all criminal actions amounting to felony, on questions of law alone.

NOTE.—We have experienced no little difficulty in framing a section that should clearly define the appellate jurisdiction of the supreme court. Section 4 of article 6 of the constitution, so far as it related to the appellate power, as it stood prior to amendments of 1862, was as follows: “The supreme court shall have appellate jurisdiction in all cases where the matter in dispute exceeds two hundred dollars, when the legality of any tax, or impost, or municipal fine is in question, and in all criminal cases amounting to felony, on questions of law alone. * * * * *” And as amended in 1862, is as follows: “The supreme court shall have appellate jurisdiction in all cases *in equity*; also, in all cases *at law* which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars; also, in all cases arising in the probate courts; and also, in all criminal cases amounting to felony, on questions of law alone. * * * * *” To have simply followed the terms of the constitution in defining the jurisdiction, would have conveyed to one not familiar with the construction placed upon those terms by our court of last resort, but a faint idea of the extent or limit of that jurisdiction. In *Conant vs. Conant* (10 Cal. 252), which was an action for a divorce from the bonds of matrimony by the wife against her husband, an objection was taken to the hearing of the appeal, based upon the ground of want of appellate jurisdiction, because no question of property was involved. Said Field, J., delivering the opinion of the court: “A preliminary objection is taken to the hearing of the appeal, that this court possesses no appellate jurisdiction in a case of divorce, when a question of property is not involved in its determination. The

fourth section of article sixth of the constitution provides that the supreme court shall have appellate jurisdiction in cases where the matter in dispute exceeds two hundred dollars; when the legality of any tax, toll, or impost, or municipal fine is in question; and in all criminal cases amounting to felony, on questions of law alone." We do not understand the last words of the first clause of this section as restricting the jurisdiction only to those cases which involve questions of property, or the legality of a tax, toll, impost or municipal fine. As we read the section, the court possesses appellate jurisdiction in all cases; provided, that when the subject of litigation is capable of pecuniary compensation, the matter in dispute must exceed in value or amount two hundred dollars, unless the question of the legality of a tax, toll, impost or municipal fine is drawn in question. Similar language, as to the amount, is used in defining the original jurisdiction of the district courts. The sixth section of the same article declares that "the district courts shall have original jurisdiction, in law and equity, in all civil cases when the amount in dispute exceeds two hundred dollars, exclusive of interest."

"It could never have been the intention of the framers of the constitution to deny to the higher courts, both original and appellate, any jurisdiction in that large class of cases where the relief sought is not susceptible of pecuniary estimation, such as suits to prevent threatened injury, respecting the guardianship of children, honorary offices, to which no salary is attached, and the like. And yet, to this result the position of the respondent directly leads. We think the construction contended for too narrow, and not imperatively required by the language of the constitution." In *Knowles vs. Yates* (31 Cal. 84), which was a proceeding under the act of 1850, providing for contesting elections, it was contended that under the amendments of 1862, the appellate jurisdiction of the court was confined to the class of cases enumerated in article 4, as amended, viz:

1. To cases in equity.
2. To the cases at law involving questions of property or the legality of a tax, etc.
3. To cases arising in the probate courts.
4. To criminal cases.

And that therefore there was no appellate jurisdiction over special proceedings, or any class of cases not included within the constitutional enumeration. After argument and re-argument, the court, C. J. Currey delivering the opinion, sustained the jurisdiction. Said the learned justice, speaking for the court:

"On the part of the respondent it is insisted that this section, as amended, is a more distinct and exact limitation of the appellate powers of the supreme court, than was the section as it stood in the old constitution, and that the general words, 'all cases at law,' are limited and restrained by the particular words following in the same clause. We are of opinion, however, that as to the point under consideration these corresponding sections of the old and new consti-

tutions are substantially the same, so that the opinion and judgment in *Conant vs. Conant* may be regarded to be quite as applicable to the case before us as it would have been had the constitution, in the particular noticed, remained unchanged.

“The learned judge, in the case referred to, seems to have had in mind the rules of interpretation defined by Rutherford, as rational and mixed. Rational interpretation is when the words of an instrument do not express the author's intention perfectly, but either exceed or fall short of it, so that the intention is to be collected from probable or rational conjectures only; and mixed interpretation, that is, an interpretation partly literal and partly rational, is when the author's words, though they do express his intention when rightly understood, are in themselves of doubtful meaning, rendering it necessary to have recourse to the like conjectures to find out in what sense the words were used; in which case the intention is collected from the words, but not without the help of other conjectures. (Rutherford's *Institutes*, B. 2, chap. 7, § 3.) By means of these rules of interpretation, the spirit of the text is saved from sacrifice to its strict letter. When the provisions of a statute or of the organic law are clear and precise, and attended with no difficulty in the application, there is no room for any interpretation or comment. The intention of the lawgiver is what must be adhered to. But if the language of the instrument is indeterminate, vague or susceptible of a more or less extensive sense, we must presume the intention according to the laws of reason and equity; and for this purpose it is necessary to pay attention to the nature of the things to which the question relates. In this connection, Vattel says: ‘There are certain things in which equity admits the extension rather than the restriction; that is to say, that the precise point of the will not being discovered in the expressions of the law or contract, it is safer and more consistent with equity to suppose and fix that point in the more extensive than in the more limited sense of the terms.’ (Vattel, B. 2, chap. 17, § 300.) Kent says: ‘It is an established rule in the exposition of statutes that the intention of the lawgiver is to be deduced from a view of the whole and of every part of a statute, taken and compared together. The real intention, when accurately ascertained, will always prevail over the literal sense of terms. When the expression in a statute is special or particular, but the reason is general, the expression shall be deemed general;’ and he holds that the reason and intention of the lawgiver will control the strict letter of the law when the letter would lead to palpable injustice, contradiction and absurdity. (1 Kent's Com. 461, 462.) These authorities apply as fully to the interpretation and construction of constitutions as to contracts, treaties and legislative enactments.

“The constitution of this state was created and adopted by a free people in order to secure to themselves and their posterity the blessings of liberty. In the declaration of rights, the great fundamental truths that ‘all men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property; and pursuing and obtaining safety and happiness,’ are distinctly announced; and it is declared that all political power is inherent in the people; that government is instituted for the protection, security and benefit of the people, and that no person shall be deprived of life, liberty or property without due process of law. The constitution secures to the citizen the right of suffrage, without which he could not exert his political power, and without which he would be impotent to secure to himself the full enjoyment of life, liberty and property.

“For the accomplishment of the objects and ends of the

government of the state, its powers are divided into three departments, to each of which is assigned its appropriate functions. The judicial department is vested in various courts, having either original or appellate jurisdiction, or both, among which the supreme court is of highest authority. To it, as the court of *dernier resort*, it may fairly be presumed the people intended the citizen might go, in matters of gravest concern, for the enforcement of his rights or for the redress of wrongs sustained. There is no right which is of greater value to him than his right to say by his vote who shall be intrusted with the exercise of the powers of the government in its several departments, because the free enjoyment of the right of choice is precedent and essential to the protection and security provided for and promised to him in the constitution. Then to deny to him the right of appeal to the highest tribunal of the state in cases where he may have been deprived of a right which lies at the foundation of all others, would, it seems to us, be depriving him of a privilege which it was designed by those who adopted the constitution he should have and enjoy. To so interpret the provisions of the constitution defining the jurisdiction of this court as to close the door to his appeal, would, in our judgment, be to refuse to appreciate the intention of the people who adopted the constitution, as deduced from a view of it as a charter of our liberties, and would, by an adherence to the strict letter of the particular provision, involve us in a contradiction of the manifest design of the constitution as a whole; and further, we would thereby hold that in cases involving rights of the highest and most sacred importance, the party concerned could be heard only in courts of inferior grade, though reason and justice might demand that he should have a right of redress commensurate with the magnitude of the interest at stake.

"In aid of the interpretation which we give to the section of the constitution under consideration, we may refer to the exposition and practice of the judicial department of the state government since its organization. The highest courts of original jurisdiction have been in the practice, from the beginning, of taking cognizance of cases in which the subject matter was not susceptible of pecuniary estimation, and concerning which no mention in terms was made in the constitution. Cases of divorce are of this class, as also suits to prevent threatened injuries, respecting the guardianship of children, honorary offices, and proceedings in the nature of writs of *quo warranto*; and in all such cases the supreme court, throughout the same period, entertained and exercised appellate jurisdiction. Contemporaneous exposition has ever been esteemed by jurists and statesmen as strong evidence in support of an interpretation or construction of a statute, or of a provision of the organic law in consonance with such exposition. *Contemporanea expositio est fortissima in lege* is a maxim of the civil law, resting for its support on a foundation of solid reason.

"We do not mean to be understood as holding that, notwithstanding contemporaneous exposition on the part of the judicial tribunals and legislatures of the state may be cogent evidence in aid of a particular interpretation or construction of the constitution, that such interpretation or construction, even though sanctioned by long usage, should be upheld, if the same be clearly repugnant to the express and unequivocal terms of the instrument. It is to the words of the constitution we must have recourse in the first place to ascertain what may be intended by any of its provisions. Its spirit and intent must be collected chiefly from its words, and what its words mean in their relations to each other and to the subject matter of its provisions, it is oftentimes the office of interpretation to discover.

"The provision of the constitution which the court, in *Conant vs. Conant*, was called upon to expound, was regarded as failing to clearly define the jurisdiction of the supreme court in relation to the subject matter of that case, and others of like nature. It was considered as falling short of expressing the entire extent of the court's appellate jurisdiction, and hence we may presume recourse was had to other provisions of the constitution and to a consideration of its grand aims and purposes, in order to ascertain its true meaning and intent. With the exposition given to the fourth section of the sixth article of the old constitution by the highest court of the state, the section was amended and adopted by the people, but without changing it so as to deprive the supreme court of appellate jurisdiction in cases like the one before us. As we view the subject in all its relations, we must hold that this court has not the right to decline jurisdiction in the premises. (*Perry vs. Ames*, 26 Cal. 383, 387.)"

In constructing this section, we have kept steadily in view these authoritative expositions of the constitution, and have endeavored to engraft their results upon the text of the amendment of 1862, and now submit to the profession, for their consideration, this section, as the result of our labors to that end. We have not used the phrases "cases in equity," "cases at law," and it is a little singular, to say the least, that those phrases were inserted in the constitution more than ten years after the adoption of our practice act, the very first section of which declared that there should be one form of civil actions, obliterating at once the distinctions between actions at law and suits in equity, abolishing the forms of all such actions and placing in their stead the proceedings under the practice act. The continued use of those phrases, and of the terms ejectment, trespass, replevin, etc., when applied to proceedings in our courts, leads but to confusion, and has retarded the enforcement of the practice act in the spirit of its conception. We omit from this part of the code an enumeration of the particular orders, etc., which are appealable *per se*. A more appropriate place, in our opinion, for such enumeration, will be in part II, under the title "appeals in civil actions."

May revoke,
affirm or
modify, etc

Remittitur.

SEC. 45. The court may reverse, affirm or modify any order or judgment appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had. Its judgment must be remitted to the court from which the appeal was taken.

Number of
judges nec-
essary for the
transaction
of business.

SEC. 46. The presence of three justices is necessary for the transaction of business, but one or more of the justices may transact such business as can be done at chambers, and may adjourn the court from day to day, with the same effect as if all were present.

SEC. 47. The concurrence of three justices is necessary to pronounce a judgment; if three do not concur, the case must be reheard. Number to pronounce judgment.

SEC. 43. There must be four terms in each year for the hearing of causes, to commence on the second Monday of January, April, July and October, and to continue until the fourth Saturday thereafter, inclusive, unless all the cases ready for hearing be sooner heard. They may, however, be continued as much longer as, in the opinion of the court, the public interests require. Additional terms may also be held by order of the court. Opinions may be filed and judgments and orders entered in vacation. Terms, when held.
Additional terms. Opinions, etc., may be filed in vacation.

SEC. 49. The terms of this court must be held at the capital of the state. If proper rooms in which to hold the court, and for the chambers of the justices, are not provided by the state, together with attendants, furniture, fuel, lights and stationery, suitable and sufficient for the transaction of business, the court may direct the sheriff of the county in which it is held to provide such rooms, attendants, furniture, fuel, lights and stationery, and the expenses thereof, certified by a majority of the justices to be correct, must be paid out of the state treasury. Terms, where held.

NOTE.—The provision of the act of 1863 (Stat. 1863, p. 334), requiring the court to give written opinions in important cases, has been omitted. In *Houston vs. Williams* (13 Cal. 24), it was held that the constitutional duty of the court was discharged by the rendition of decisions; that the legislature could no more require the court to state the reasons for its decisions than the court could require the legislature to accompany the statutes with the reasons for their enactment. Says Justice Field: "No such power can exist in the legislative department, or be sanctioned by any court which has the least respect for its own dignity and independence." The provisions of the same act, relating to the "allotment" of the first justices elected under the amendments of 1862, is omitted, having performed its office.

The manner in which vacancies are to be filled is provided for by a section relating to vacancies in judicial offices.

The power to make rules will be placed under the general power of courts of record, as also will the provisions of the act of 1863, relative to changing the place of holding court in certain contingencies.

CHAPTER IV.

OF THE DISTRICT COURTS.

SECTION 54. Judicial districts.

- 55. Court in each district.
- 56. Judges—election and terms of.
- 57. Jurisdiction.
- 58. Terms of court in the first district.
- 59. Second district.
- 60. Third district.
- 61. Fourth district.
- 62. Fifth district.
- 63. Sixth district.
- 64. Seventh district.
- 65. Eighth district.
- 66. Ninth district.
- 67. Tenth district.
- 68. Eleventh district.
- 69. Twelfth district.
- 70. Thirteenth district.
- 71. Fourteenth district.
- 72. Fifteenth district.
- 73. Sixteenth district.
- 74. Seventeenth district.
- 75. Terms of the district court, where held.
- 76. Duration of terms.
- 77. Adjournment of the court.
- 78. Judgments may be entered in vacation.

Judicial
districts.

SEC. 54. The state is divided into seventeen judicial districts.

Court in each
district.

SEC. 55. There must be a district court held in each of the judicial districts.

Judges—
election and
terms of.

SEC. 56. The judge thereof is elected by the electors of the district, at the judicial elections, and holds his office for the term of six years from the first day of January next succeeding his election.

Jurisdiction.

SEC. 57. The jurisdiction of the district courts extends—

1. To all civil actions for relief formerly given in courts of equity.

2. To all civil actions in which the subject of litigation is not capable of pecuniary compensation.

3. To all civil actions (except actions of forcible entry and detainer) in which the subject of litigation is capable

of pecuniary compensation, which involve the title or possession of real estate or the legality of any tax, impost, assessment, toll or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars. Jurisdiction.

4. To all special proceedings not within the jurisdiction of the county court, as defined in this code.

5. To the issuance of writs of mandamus, certiorari, prohibition, habeas corpus, and all writs necessary to the exercise of its powers.

6. To the trial of all indictments for treason, misprision of treason, murder and manslaughter.

NOTE.—In the construction of a section which should convey a clear idea of the civil jurisdiction of the district court, we are met with the same difficulties that were encountered in drafting the section relative to the appellate jurisdiction of the supreme court. Section 6 of article 6 of the constitution, which defines the jurisdiction of the district court, follows the language (so far as civil jurisdiction is concerned) of section 4 of the same article relating to the jurisdiction of the supreme court, and it must, from the very nature of things, receive the same construction. We would look in vain, giving to its terms their ordinary import, for any power or authority over that large class of cases in which the subject of litigation is incapable of pecuniary estimation, and which did not fall within the jurisdiction of courts of equity, or over that other class known as special proceedings, or for the power to issue writs of certiorari, mandamus or prohibition. The truth is, that the amendments of 1862, in so far as they attempt to fix and define the jurisdiction of the several courts of record, were so framed that to have given their terms any fair or reasonable construction, would have emasculated our whole judicial system. To support this proposition, we need but refer the lawyer to the terms of those amendments and invoke a comparison between the power there conferred and the power now exercised by our courts of record, and we need but to the same end refer the layman to the case of *Knowles vs. Yates*, cited and quoted from at length in the note to section 44, and to the able and elaborate opinion of Justice Rhodes, in *Courtwright vs. B. R. & A. W. & M. Co.* (30 Cal. 578). In the latter case, said the learned justice, speaking for the court: "It is a matter of some doubt whether that article (article 6, before the amendments) deserved the commendation of having been drawn with great skill * * * but there is less question that the same cannot be said of the article (article 6) as it now stands." See also *Perry vs. Ames* (26 Cal. 383). The supreme court, by judicial construction, has fixed the limit of the jurisdiction of the different courts. From the very

necessities of the case that tribunal was driven to the adoption of the broadest rules of constitutional construction. Indeed it may well be doubted whether any rule, save of that "necessity which knows no law," could have been invoked to work out the results at which our courts have arrived. We have referred to these matters at some length in this and the note to section 44, in order to present the inherent difficulties surrounding the subject, and to call the especial attention of the profession to the questions involved.

Terms of
court in the
first district.

SEC. 58. In the first judicial district, terms of the district court must be held as follows :

In the county of San Luis Obispo, on the first Monday of January, May and September.

In the county of Santa Barbara, on the third Monday of February, June and October.

Second
district.

SEC. 59. In the second judicial district, terms of the district court must be held as follows :

In the county of Butte, on the first Monday of March, third Monday of November and second Monday of July.

In the county of Lassen, on the second Monday of June and second Monday of September.

In the county of Plumas, on the fourth Monday of May and first Monday of October.

In the county of Tehama, on the fourth Monday of October, fourth Monday of January and first Monday of May.

Third
district.

SEC. 60. In the third judicial district, terms of the district court must be held as follows :

In the county of Alameda, on the third Monday of February, June and October.

In the county of Monterey, on the first Monday of April and October.

In the county of Santa Clara, on the second Monday of January, May and September.

In the county of Santa Cruz, on the second Monday of April, August and December.

Fourth
district.

SEC. 61. In the fourth judicial district, terms of the district court must be held as follows :

In the county of San Francisco, on the first Monday of February, May, August and November.

Fifth
district.

SEC. 62. In the fifth judicial district, terms of the district court must be held as follows :

In the county of San Joaquin, on the first Monday of February, May and August, and on the third Monday of October.

In the county of Stanislaus, on the second Monday of January, April and September.

In the county of Tuolumne, on the first Monday of March and July, and on the third Monday of November.

SEC. 63. In the sixth judicial district, terms of the district court must be held as follows: Sixth district.

In the county of Sacramento, on the first Monday of February, April, June, August, October and December.

In the county of Yolo, on the third Monday of January, May and September.

SEC. 64. In the seventh judicial district, terms of the district court must be held as follows: Seventh district.

In the county of Lake, on the third Monday of April and second Monday of November.

In the county of Marin, on the first Monday of March and July, and third Monday of November.

In the county of Mendocino, on the second Monday of April, third Monday of July and first Monday of November.

In the county of Napa, on the first Monday of February, June and October.

In the county of Solano, on the third Monday of January, May and September.

In the county of Sonoma, on the third Monday of February, June and October.

SEC. 65. In the eighth judicial district, terms of the district court must be held as follows: Eighth district.

In the county of Del Norte, on the second Monday of May, August and November.

In the county of Humboldt, on the second Monday of March, June, September and December.

In the county of Klamath, on the second Monday of April, July and October.

SEC. 66. In the ninth judicial district, terms of the district court must be held as follows: Ninth district.

In the county of Shasta, on the second Monday of March, June and November.

In the county of Siskiyou, on the third Monday of January, May and September.

In the county of Trinity, on the second Monday of April, August and December.

Tenth
district.

SEC. 67. In the tenth judicial district, terms of the district court must be held as follows :

In the county of Colusa, on the first Monday of May, September and December.

In the county of Sierra, on the first Monday of April, second Monday of July and fourth Monday of October.

In the county of Sutter, on the fourth Monday of February and June, and third Monday of October.

In the county of Yuba, on the third Monday of January, May and September.

Eleventh
district.

SEC. 68. In the eleventh judicial district, terms of the district court must be held as follows :

In the county of Amador, on the second Monday of March, June, September and December.

In the county of Calaveras, on the second Monday of January, April, July and October.

In the county of El Dorado, on the second Monday of February and May, and on the third Monday of August and November.

Twelfth
district.

SEC. 69. In the twelfth judicial district, terms of the district court must be held as follows :

In the county of San Francisco, on the first Monday of January, April, July and October.

In the county of San Mateo, on the third Monday of March and fourth Monday of June, September and December.

Thirteenth
district.

SEC. 70. In the thirteenth judicial district, terms of the district court must be held as follows :

In the county of Fresno, on the third Monday of January and May, and second Monday of October.

In the county of Mariposa, on the first Monday of February, June and October.

In the county of Merced, on the fourth Monday of January, May and September.

In the county of Tulare, on the first Monday of January and May, and third Monday of October.

SEC. 71. In the fourteenth judicial district, terms of the district court must be held as follows: Fourteenth district

In the county of Nevada, on the second Monday of March, June, September and December.

In the county of Placer, on the first Monday of February, May, August and November.

SEC. 72. In the fifteenth judicial district, terms of the district court must be held as follows: Fifteenth district.

In the county of Contra Costa, on the third Tuesday of April, July and November.

In the city and county of San Francisco, on the first Monday of March, June, September and December.

SEC. 73. In the sixteenth judicial district, terms of the district court must be held as follows: Sixteenth district.

In the county of Alpine, on the first Monday of April and October.

In the county of Inyo, on the first Monday of May and November.

In the county of Kern, on the third Monday of May and November.

In the county of Mono, on the third Monday of April and October.

SEC. 74. In the seventeenth judicial district, terms of the district court must be held as follows: Seventeenth district.

In the county of Los Angeles, on the first Monday of February, May, August and November.

In the county of San Bernardino, on the first Monday of January, June and September.

In the county of San Diego, on the first Monday of April, July and October.

SEC. 75. The terms of the district courts must be held at the county seats of the several counties. Terms of district courts, where held.

SEC. 76. Each term must be held until the business is disposed of, or until a day fixed for the commencement of some other term in the district. Duration of terms.

SEC. 77. The court may adjourn from time to time during the term, and may, when the public convenience Adjournment of court.

requires, adjourn the term over the time fixed by law for the commencement of another term in the same district.

Judgments
may be
entered in
vacation.

SEC. 78. Judgments and orders of this court may be entered either in term or vacation.

Statutes of 1863, p. 336.

CHAPTER V.

OF THE COUNTY COURTS.

SECTION 82. Court in each county.

83. Judges—election and terms of.

84. Jurisdiction of two kinds.

85. Original jurisdiction.

86. Appellate jurisdiction.

87. Presumptions in favor of judgments, etc.

88. Terms of the county court for the respective counties.

89. Court always open for certain purposes.

90. Terms of the county court, where held.

Court in each
county.

SEC. 82. There must be a county court held in each of the counties, by the county judge thereof.

Judges—
election and
terms of.

SEC. 83. The county judge is elected by the electors of the county, at the judicial elections, and holds his office for the term of four years from the first day of January next succeeding his election.

Jurisdiction
of two kinds.

SEC. 84. The jurisdiction of this court is of two kinds:

1. Original; and,
2. Appellate.

Original
jurisdiction.

SEC. 85. Its original jurisdiction extends—

1. To actions to prevent or abate a nuisance.
2. To actions of forcible entry and detainer.
3. To proceedings in insolvency.
4. To all such special cases or proceedings in which the law giving the remedy or authorizing the proceedings, confers the jurisdiction upon it.
5. To the issuance of writs of mandamus, certiorari, prohibition, habeas corpus and all writs necessary to the exercise of its powers.

6. To inquire, by the intervention of a grand jury, of all public offences committed or triable in their respective counties.

7. To the trial of all indictments, except for treason, misprision of treason, murder and manslaughter.

NOTE.—See notes to sections 44 and 57, relating to jurisdiction of supreme and district courts.

SEC. 86. Its appellate jurisdiction extends to all cases arising in justices' or police courts. Appellate jurisdiction.

SEC. 87. The proceedings of this court are construed in the same manner, and with like intendments, as the proceedings of courts of general jurisdiction, and to its records, orders, judgments and decrees, there is accorded like force, effect and legal presumptions, as to the records, orders, judgment and decrees of district courts. Presumptions in favor of its judgments, etc.

SEC. 88. The terms of the county courts in the respective counties must be held as follows: Terms of the county courts for the respective counties.

In the county of Alameda, on the first Monday of January, April and July, and third Monday of September.

In the county of Alpine, on the first Monday of February, June and October.

In the county of Amador, on the first Monday of February, May, August and November.

In the county of Butte, on the first Monday of January, March, May, July, September and November.

In the county of Calaveras, on the first Monday of March, June, September and December.

In the county of Colusa, on the third Monday of January, April, July and October.

In the county of Contra Costa, on the first Monday of March, August and November.

In the county of Del Norte, on the first Monday of April, July and October.

In the county of El Dorado, on the second Monday of March, June, September and December.

In the county of Fresno, on the first Monday of January, March, May, July, September and November.

In the county of Humboldt, on the first Monday of January, March, May, July, September and November.

Terms of
the county
courts for the
respective
counties.

In the county of Inyo, on the first Monday of January, March, May, July, September and November.

In the county of Kern, on the first Monday of January, March, May, July, September and November.

In the county of Klamath, on the first Monday of April, July and October.

In the county of Lake, on the first Monday of January, April, July and October.

In the county of Lassen, on the first Monday of February, May, August and November.

In the county of Los Angeles, on the first Monday of January, March, May, July, September and November.

In the county of Marin, on the third Monday of March, June, September and December.

In the county of Mariposa, on the first Monday of January, March, May, July, September and November.

In the county of Mendocino, on the first Monday of March, June, September and December.

In the county of Merced, on the first Monday of January, March, May, July, September and November.

In the county of Mono, on the first Monday of January, May and September.

In the county of Monterey, on the second Monday of January and July, and third Monday of March and September.

In the county of Napa, on the first Monday of March, September and December, and third Monday of June.

In the county of Nevada, on the first Monday of February, May, August and November.

In the county of Placer, on the first Monday of January, March, May, July, September and November.

In the county of Plumas, on the first Monday of March, June, September and December.

In the county of Sacramento, on the first Monday of January, April, July and October.

In the county of San Bernardino, on the first Monday of January, March, May, July, September and November.

In the county of San Diego, on the first Monday of January, March, May, July, September and November.

In the county of San Francisco, on the first Monday of January, March, May, July, September and November.

In the county of San Joaquin, on the first Monday of January, March, May, July, September and November.

In the county of San Luis Obispo, on the first Monday of March, June, September and December.

Terms of
the county
courts for the
respective
counties.

In the county of San Mateo, on the first Monday of February and June, and last Monday of September.

In the county of Santa Barbara, on the first Monday of March, June, September and December.

In the county of Santa Clara, on the third Monday of February, May, August and November.

In the county of Santa Cruz, on the first Monday of January, March, May, July, September and November.

In the county of Shasta, on the first Monday of January, May and September.

In the county of Sierra, on the third Monday of April, June and September, and second Monday of December.

In the county of Siskiyou, on the first Monday of January, March, May, July, September and November.

In the county of Solano, on the third Monday of April, August and December.

In the county of Sonoma, on the first Monday of January, April, July and October.

In the county of Stanislaus, on the first Monday of January, March, May, July, September and November.

In the county of Sutter, on the first Monday of January, April, July and October.

In the county of Tehama, on the first Monday of January, March, May, July, September and November.

In the county of Trinity, on the first Monday of January, March, May, July, September and November.

In the county of Tulare, on the first Monday of January, March, May, July, September and November.

In the county of Tuolumne, on the first Monday of January, May and September.

In the county of Yolo, on the first Monday of January, April, July and October.

In the county of Yuba, on the first Monday of January, April and July, and second Monday of October.

SEC. 89. For the purpose of hearing and determining actions arising under the forcible entry and detainer act of this state, motions for new trials, and the entry of orders and judgments, this court is always open and in session.

Court always
open for cer-
tain purposes

Terms of
the county
court, where
held.

SEC. 90. The terms of the county courts must be held at the county seats.

CHAPTER VI.

OF THE PROBATE COURT.

SECTION 94. Court in each county.

95. Judges of.

96. Judge of, in San Francisco.

97. Jurisdiction of.

98. Presumptions in favor of its judgments.

99. Terms of the court in the respective counties.

100. Terms, where held.

Court in each
county.

SEC. 94. There must be a probate court held in each of the counties.

Judges of.

SEC. 95. The county judge of each county, except in the city and county of San Francisco, is the judge of the probate court.

Judge of, in
San Fran-
cisco.

SEC. 96. In the city and county of San Francisco the probate court is held by a probate judge elected by the electors thereof, at the judicial elections, and who holds his office for the term of four years from the first day of January next succeeding his election.

Jurisdiction
of.

SEC. 97. The probate court has jurisdiction—

1. To open and receive proof of last wills and testaments, and to admit them to proof.

2. To grant letters testamentary, of administration and of guardianship, and to revoke the same.

3. To appoint appraisers of estates of deceased persons.

4. To compel executors, administrators and guardians to render accounts.

5. To order the sale of property of estates, or belonging to minors.

6. To order the payment of debts due from estates.

7. To order and regulate all partitions of property or estates of deceased persons.

8. To compel the attendance of witnesses, and the pro-

duction of title deeds, papers and other property of an estate, or of a minor.

9. To make such orders as may be necessary to the exercise of the powers conferred upon it.

Statutes of 1863, p. 339.

SEC. 98. The proceedings of this court are construed in the same manner, and with like intendments, as the proceedings of courts of general jurisdiction, and to its records, orders, judgments and decrees, there is accorded like force, effect and legal presumptions, as to the records, orders, judgment and decrees of district courts.

Presump-
tions in
favor of its
judgments.

Statutes of 1863, p. 339.

SEC. 99. The terms of the probate court in the respective counties must be held as follows :

Terms of the
court in the
respective
counties.

In the county of Alameda, on the first Monday of January, April and July, and third Monday of September.

In the county of Alpine, on the first Monday of February, June and October.

In the county of Amador, on the first Monday of February, May, August and November.

In the county of Butte, on the first Monday of January, March, May, July, September and November.

In the county of Calaveras, on the first Monday of March, June, September and December.

In the county of Colusa, on the first Monday of each month.

In the county of Contra Costa, on the first Monday of March, August and November.

In the county of Del Norte, on the first Monday of April, July and October.

In the county of El Dorado, on the second Monday of January, April, July and October.

In the county of Fresno, on the first Monday of January, March, May, July, September and November.

In the county of Humboldt, on the first Monday of January, March, May, July, September and November.

In the county of Inyo, on the first Monday of January, March, May, July, September and November.

In the county of Kern, on the first Monday of January, March, May, July, September and November.

Terms of the
court in the
respective
counties.

In the county of Klamath, on the first Monday of April, July and October.

In the county of Lake, on the first Monday of January, April, July and October.

In the county of Lassen, on the first Monday of February, May, August and November.

In the county of Los Angeles, on the first Monday of January, March, May, July, September and November.

In the county of Marin, on the third Monday of March, June, September and December.

In the county of Mariposa, on the first Monday of January, March, May, July, September and November.

In the county of Mendocino, on the first Monday of March, June, September and December.

In the county of Merced, on the first Monday of January, March, May, July, September and November.

In the county of Mono, on the first Monday of January, May and September.

In the county of Monterey, on the first Monday of each month.

In the county of Napa, on the first Monday of March, September and December, and third Monday of June.

In the county of Nevada, on the first Monday of each month.

In the county of Placer, on the first Monday of January, March, May, July, September and November.

In the county of Plumas, on the first Monday of March, June, September and December.

In the county of Sacramento, on the first Monday of January, April, July and October.

In the county of San Bernardino, on the fourth Monday of each month.

In the county of San Diego, on the first Monday of January, March, May, July, September and November.

In the county of San Francisco, on the first Monday of each month.

In the county of San Joaquin, on the first Monday of January, March, May, July, September and November.

In the county of San Luis Obispo, on the first Monday of March, June, September and December.

In the county of San Mateo, on the first Monday of February and June, and last Monday of September.

In the county of Santa Barbara, on the first Monday of March, June, September and December.

Terms of the court in the respective counties.

In the county of Santa Clara, on the first Monday of each month.

In the county of Santa Cruz, on the first Monday of January, March, May, July, September and November.

In the county of Shasta, on the first Monday of February, April, June, August, October and December.

In the county of Sierra, on the first Monday of each month.

In the county of Siskiyou, on the first Monday of January, March, May, July, September and November.

In the county of Solano, on the third Monday of April, August and December.

In the county of Sonoma, on the first Monday of each month.

In the county of Stanislaus, on the first Monday of January, March, May, July, September and November.

In the county of Sutter, on the first Monday of each month.

In the county of Tehama, on the first Monday of January, March, May, July, September and November.

In the county of Trinity, on the first Monday of January, March, May, July, September and November.

In the county of Tulare, on the first Monday of January, March, May, July, September and November.

In the county of Tuolumne, on the fourth Monday of each month.

In the county of Yolo, on the first Monday of January, April, July and October.

In the county of Yuba, on the first Monday of each month.

SEC. 100. The terms of the probate court must be held at the county seats.

Terms, where held.

CHAPTER VII.

OF THE MUNICIPAL CRIMINAL COURT OF SAN FRANCISCO.

SECTION 104. This court continued.

105. Judge—election and term.

106. Jurisdiction.

107. Presumptions in favor of its judgments.

108. Terms of court.

109. Where held.

This court
continued.

SEC. 104. The court known as "The Municipal Criminal Court of San Francisco," is hereby continued, with the jurisdiction conferred by this chapter.

Judge—
election and
term.

SEC. 105. The judge thereof is elected by the electors of the city and county of San Francisco, and holds his office for the term of four years from the first day of January next succeeding his election.

Statutes of 1870, p. 528.

Jurisdiction.

SEC. 106. Its jurisdiction extends to the trial of all indictments transmitted to it for trial by the county court of the city and county of San Francisco.

Statutes of 1870, p. 529.

NOTE.—Section 796 of the penal code provides that all indictments found and triable in the county court of San Francisco must be transmitted to this court for trial.

Presump-
tions in
favor of its
judgments.

SEC. 107. The proceedings of this court are construed in the same manner and with like intendments as the proceedings of courts of general jurisdiction, and to its records, orders and judgments there is accorded like force, effect and legal presumptions, as to the records, orders, judgment and decrees of the district court.

Statutes of 1870, p. 529.

Terms of
court.

SEC. 108. There must be six terms of this court held in each year, commencing on the first Monday of January, March, May, July, September and November.

Statutes of 1870, p. 823.

Where held.

SEC. 109. This court must be held at such place in the city and county of San Francisco as may be fixed by the board of supervisors.

NOTE.—The portions of the act of 1870 (Stat. 1870, p. 528) not included in the provisions of this chapter, such as those relating to appeals, the duties of clerks, sheriff, and the power of the judge at chambers, will be found under those heads in the different codes.

CHAPTER VIII.

OF JUSTICES' COURTS.

SECTION 112. Justices of the peace must hold.

113. Justices—election and term.

114. Civil jurisdiction.

115. Civil jurisdiction restricted.

116. Territorial extent of civil jurisdiction.

117. Criminal jurisdiction.

118. Courts, where held and when open.

SEC. 112. Every justice of the peace must hold a justice's court in the town or city in which he is elected.

Justices of the peace must hold.

Statutes of 1863, p. 340.

SEC. 113. Justices of the peace are elected by the electors of their respective townships or cities, at the judicial elections, and hold their offices for two years from the first day of January next following their election.

Justices—election and term.

Statutes of 1863, p. 340.

SEC. 114. The civil jurisdiction of these courts within their respective townships or cities extends—

Civil jurisdiction.

1. To an action arising on contract, for the recovery of money only, if the sum claimed, exclusive of interest, does not amount to three hundred dollars.

2. To an action for damages for injury to the person, or for taking or detaining personal property, or for injuring real or personal property, if the damages claimed do not amount to three hundred dollars.

3. To an action for a fine, penalty or forfeiture, not amounting to three hundred dollars, given by statute or the ordinance of an incorporated city or town.

4. To an action upon a bond or undertaking conditioned for the payment of money, not amounting to three hundred dollars, though the penalty exceed that sum; the

judgment to be given for the sum actually due. When the payments are to be made by instalments, an action may be brought for each instalment as it becomes due.

5. To an action to recover the possession of personal property, when the value of such property does not amount to three hundred dollars.

6. To take and enter judgment on the confession of a defendant, when the amount confessed, exclusive of interest, does not amount to three hundred dollars.

7. To an action to recover damages for injury to a mining claim, when the damages claimed do not amount to three hundred dollars.

NOTE.—The preceding section is based upon the act of 1863 (Stat. 1863, p. 340). In the original section the jurisdiction extended in actions upon a contract or to recover damages to an “amount not exceeding three hundred dollars.” The constitution (art. 6, § 9) declares that the jurisdiction of these courts shall not trench upon the jurisdiction of courts of record, and section 6 of the same article conferred jurisdiction in this class of cases when the sum in controversy amounts to three hundred dollars. To obviate this constitutional objection, we have stricken out the words “does not exceed three hundred dollars,” wherever they occurred in the original section, and inserted in stead thereof the words “does not amount to three hundred dollars.”

Subdivision 5 of the original section gave these courts jurisdiction of actions of foreclosure when the debt secured did not exceed three hundred dollars, trenching upon the equity jurisdiction east by the constitution upon the district courts; therefore we have omitted this subdivision, and for kindred reasons we have omitted the provisions of the eighth subdivision of the original section, conferring jurisdiction upon justices' courts to determine the right to a mining claim, when the value of the claim did not exceed three hundred dollars.

Civil jurisdiction
restricted.

SEC. 115. The jurisdiction conferred by the last section shall not extend, however—

1. To a civil action in which the title or possession of real property necessarily comes in question.

2. Nor to an action or proceeding against ships, vessels or boats, or against the owners or masters thereof, when the suit or proceeding is for the recovery of seamen's wages for a voyage performed in whole or in part without the waters of this state.

SEC. 116. The civil jurisdiction of justices' courts, within an incorporated city, extends to the limits of such city, or township in which the city is situated. Mesne and final process of justices' courts may be issued to any part of the county in which they are held.

Territorial
extent of
civil juris-
diction.

Statutes of 1863, p. 340.

SEC. 117. These courts have jurisdiction of the following public offences, committed within the respective counties in which such courts are established :

Criminal
jurisdiction.

1. Petit larceny.

2. Assault and battery, not charged to have been committed upon a public officer in the discharge of his duties.

3. Breaches of the peace, riots, affrays, committing a wilful injury to property, and all misdemeanors punishable by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or by both such fine and imprisonment.

Statutes of 1870, p. 579.

SEC. 118. These courts may be held at any place selected by the justice holding the same, in the township or city for which he is elected, and they are always open for the transaction of business.

Courts,
where held
and when
open.

Statutes of 1863, p. 341.

CHAPTER IX.

OF POLICE COURTS.

SECTION 121. Organization, etc., provided for in political code.

SEC. 121. Police courts are established in incorporated cities and villages, and their organization, jurisdiction and powers provided for in the political code, part two.

Organiza-
tion, etc.,
provided for
in political
code.

CHAPTER X.

GENERAL PROVISIONS RESPECTING COURTS OF JUSTICE.

ARTICLE I. PUBLICITY OF THEIR PROCEEDINGS.

II. INCIDENTAL POWERS AND DUTIES OF COURTS.

III. JUDICIAL DAYS.

IV. PROCEEDINGS WHEN JUDGES DO NOT ATTEND TO HOLD A COURT.

V. PARTICULAR PROVISIONS RESPECTING THE PLACES OF HOLDING THE COURTS OF JUSTICE.

VI. SEALS OF THE COURTS OF JUSTICE.

ARTICLE I.

PUBLICITY OF THE PROCEEDINGS OF THE COURTS OF JUSTICE.

SECTION 124. Sittings public.

125. Limitation on preceding section.

Sittings
public.

SEC. 124. The sittings of every court of justice are public, except as provided in the next section.

Statutes of 1863, p. 342.

Limitation
on preceding
section.

SEC. 125. In an action for divorce, the court may direct the trial of any issue of fact joined therein to be private, and may exclude all persons except the officers of the court, the parties, their witnesses and counsel.

Statutes of 1863, p. 342.

ARTICLE II.

INCIDENTAL POWERS AND DUTIES OF COURTS.

SECTION 128. Powers of court respecting the conduct of judicial proceedings.

129. Courts of record may make rules.

130. When rules take effect.

Powers of
court re-
specting the
conduct of
judicial
proceedings.

SEC. 128. Every court has power—

1. To preserve and enforce order in its immediate presence.

2. To enforce order in the proceedings before it, or before a person or persons empowered to conduct a judicial investigation under its authority.

3. To provide for the orderly conduct of proceedings before it or its officers.

4. To compel obedience to its judgments, orders and process, and to the orders of a judge out of court, in an action or proceeding pending therein.

5. To control, in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto.

6. To compel the attendance of persons, to testify, in an action or proceeding pending therein, in the cases and manner provided in this code.

7. To administer oaths in an action or proceeding pending therein, and in all other cases where it may be necessary in the exercise of its powers and duties.

8. To amend and control its process and orders, so as to make them conformable to law and justice.

NOTE.—Subdivisions 1, 2, 4 and the first clause of subdivision 5, substantially embraces the provisions of section 65 of the act of 1863 (Stat. 1863, p. 342); the other subdivisions are taken from the New York code, because they concisely embody various statutory provisions scattered through our laws, or well settled common law principles, applicable to the powers of judicial tribunals. This arrangement presents them in a form convenient to the profession, and in their logical order.

SEC. 129. Every court of record may make rules, not inconsistent with the laws of this state, for its own government and the government of its officers; but such rules must neither impose a tax or charge upon any legal proceeding nor give an allowance to any officer for services.

Courts of record may make rules.

Statutes of 1863, p. 335; 1870, p. 528.

SEC. 130. The rules adopted by the supreme court take effect sixty days, and those adopted by other courts, thirty days, after their publication.

When rules take effect.

Statutes of 1863, p. 335.

ARTICLE III.

JUDICIAL DAYS.

SECTION 133. Days on which courts, etc., may be held.

134. Days on which courts shall not be opened.

135. Court appointed, etc., for those days, deemed for next day.

Days on
which
courts, etc.,
may be held.

SEC. 133. The courts of justice may be held, and judicial business may be transacted, on any day except as provided in the next section.

Statutes of 1863, p. 343.

Days on
which courts
shall not be
opened.

SEC. 134. No court can be opened, nor can any judicial business be transacted, on Sunday, on the first day of January, on the fourth of July, on Christmas or thanksgiving day, or on a day on which the general or the judicial election is held, except for the following purposes :

1. To give, upon their request, instructions to a jury when deliberating on their verdict.

2. To receive a verdict or discharge a jury.

3. For the exercise of the powers of a magistrate in a criminal action, or in a proceeding of a criminal nature.

Statutes of 1863, p. 343.

Court ap-
pointed, etc.,
for those
days deemed
for next day.
N. S.

SEC. 135. If any of the days mentioned in the last section happen to be the day appointed for the holding of a court, or to which it is adjourned, it is deemed appointed for or adjourned to the next day.

ARTICLE IV.

PROCEEDINGS WHEN JUDGES DO NOT ATTEND TO HOLD A COURT.

SECTION 139. Adjournment of court for absence of judge.

Adjourn-
ment of court
for absence
of judge.

SEC. 139. If no judge attend on the day appointed for holding the court, before noon, the sheriff or clerk must adjourn the court until the next day, at ten o'clock ; and if no judge attend on that day before noon, the sheriff or clerk must adjourn the court until the following day ; and so on, from day to day, for one week. If no judge attend for one week, the sheriff or clerk must adjourn the court for the term.

Statutes of 1863, p. 344.

ARTICLE V.

PARTICULAR PROVISIONS RESPECTING THE PLACES OF HOLDING THE COURTS OF JUSTICE.

SECTION 142. Judge may, in certain cases, change place of holding court.

143. Parties to appear at place appointed.

144. Rooms, etc., when judge may order.

SEC. 142. A judge authorized to hold or preside at a court appointed to be held in a county, city or town, may, by an order filed with the county clerk and published as he may prescribe, direct that the court be held or continued at any other place in the city, town or county than that appointed, when war, insurrection, pestilence or other public calamity, or the dangers thereof, or the destruction of the building appointed for holding the court, may render it necessary; and may in the same manner revoke the order, and, in his discretion, appoint another place in the same city, town or county, for holding the court.

Judge may, in certain cases, change place of holding court.

Statutes of 1863, p. 344.

SEC. 143. When the court is held at a place appointed as provided in the last section, every person held to appear at the court must appear at the place so appointed.

Parties to appear at place appointed.

Statutes of 1863, p. 344.

SEC. 144. If suitable rooms for holding the district courts, county courts and probate courts, and the chambers of the judges of such courts, be not provided in any county by the supervisors thereof, together with attendants, furniture, fuel, lights and stationery, sufficient for the transaction of business, the courts may direct the sheriff of such county to provide such rooms, attendants, furniture, fuel, lights and stationery, and the expenses thereof are a charge against such county.

Rooms, etc., when judge may order

Statutes of 1863, p. 345.

ARTICLE VI.

SEALS OF THE COURTS OF JUSTICE.

SECTION 147. What courts have seals.

148. Present seals to continue.

149. Seals for courts not now provided with.

150. Private seal to be used, when.

151. Seals, by whom kept.

152. To what proceedings to be affixed.

What courts
have seals.

SEC. 147. Each of the following courts has a seal :

1. The supreme court.
2. The district courts.
3. The county courts.
4. The probate courts.
5. The municipal criminal court of the city and county of San Francisco.
6. The police court of the city and county of San Francisco.

Statutes of 1863, p. 344.

Present seals
to continue.

SEC. 148. The seal now used by the supreme court shall be the seal of that court; and where seals have been provided for the district, county and probate courts, municipal criminal and the police court of the city and county of San Francisco, such seals shall continue to be used as the seals of those courts.

Statutes of 1863, p. 344.

Seals for
courts not
now pro-
vided with.

SEC. 149. The several district, county and probate courts, for which separate seals have not been heretofore provided, shall direct their respective clerks to procure seals, which shall be devised by the respective judges of such courts, and shall have the following inscriptions surrounding the same :

1. For the district courts: "District court, — county, California." (Inserting the name of the county.)
2. For the county courts: "County court, — county, California." (Inserting the name of the county.)
3. For the probate courts: "Probate court, — county California." (Inserting the name of the county.)

Statutes of 1863, p. 344.

Sec. 150. Until the seals devised, as provided in the last section, are procured, the clerk of each court may use his private seal, whenever a seal is required.

Private seal
to be used,
when.

Statutes of 1863, p. 344.

Sec. 151. The clerk of the court must keep the seal thereof.

Seals, by
whom kept.

Sec. 152. The seal of the court need not be affixed to any proceedings therein, except—

To what pro-
ceedings to
be affixed.

1. To a writ.
2. To the proof of a will, or the appointment of an executor, administrator or guardian.
3. To the authentication of a copy of a record or other proceeding of the court, or an officer thereof, for the purpose of evidence in another court.

Statutes of 1863, p. 344.

NOTE.—The provision permitting seals to be impressed on paper is omitted, as a general provision to the same end is contained in the preliminary provisions of this code.

TITLE II.

OF JUDICIAL OFFICERS.

- CHAPTER I.** *Of judicial officers in general.*
- II. *Of the powers and duties of judges at chambers.*
- III. *Particular disqualification of judges.*
- IV. *Incidental powers and duties of judicial officers.*
- V. *Miscellaneous provisions respecting courts and judicial officers.*

CHAPTER I.

OF JUDICIAL OFFICERS IN GENERAL.

- SECTION 156.** Qualifications, as to residence, of justices of supreme court.
157. Qualifications, as to residence of district judges.
158. Places of residence of judges.
159. Residence in San Francisco construed.

SECTION 160. District judges may hold courts in another district.

161. County and probate judges may hold court in another county.

162. County or probate judge who may hold term in another county, how designated.

Qualifica-
tions, as to
residence,
of justices of
the supreme
court.

SEC. 156. No person is eligible to the office of justice of the supreme court who has not been a citizen of the United States and a resident of this state, for two years next preceding his election.

Statutes of 1863, p. 333.

Qualifica-
tions, as to
residence,
of district
judges.

SEC. 157. No person is eligible to the office of district judge who has not been a citizen of the United States and a resident of this state for two years, and of the district one year, next preceding his election.

Statutes of 1863, p. 335.

Places of
residence of
judges.

SEC. 158. Each district judge must reside in his district, and each county and probate judge must reside at the county seat of his respective county.

Statutes of 1863, p. 335.

Residence in
San Francis-
co construed.

SEC. 159. A residence in any part of the city and county of San Francisco is, within the meaning of the two preceding sections, a residence in the judicial districts embracing portions of that city.

Statutes of 1863, p. 335.

District
judges may
hold courts
in another
district.

SEC. 160. A district judge may hold a court in any judicial district in this state, upon the request of the judge of the district in which such court is to be held; and when, by reason of sickness or absence from the state, or from any other cause, a court cannot be held in a district by the judge thereof, a certificate of that fact must be transmitted by the clerk to the governor, who may thereupon direct some other district judge to hold such court.

Statutes of 1863, p. 336.

County and
probate
judges may
hold court
in another
county.

SEC. 161. Any county or probate judge may hold terms, or portions of terms, of the county or probate court, and perform any or all of the duties of county or probate judge, in any other county of this state, as well as in that for which he was elected, in cases of sickness of the proper judge, or to hear, try, adjudicate and determine all causes and matters in which the county or probate judge of the

proper county is interested, or has been employed as an attorney, or is disqualified by law from trying or adjudicating.

SEC. 162. When, from any of the causes mentioned in the preceding section, a term, or portion of a term, of the county or probate court cannot be held in a county by a county or probate judge thereof, the judge disqualified may, by consent of the parties to the actions or proceedings which such judge is disqualified from adjudicating, designate the county or probate judge of some other county to hold such term or portion of a term; and if the parties fail thus to consent, a certificate of the fact of such disqualification, or in the case of sickness of the judge, then of the fact of such sickness, must be transmitted by the county clerk of such county to the governor, who must thereupon direct some county or probate judge of a neighboring county to hold such term or part of a term.

County or probate judge who may hold term in another county, how designated.

CHAPTER II.

OF THE POWERS AND DUTIES OF JUDGES AT CHAMBERS.

SECTION 165. Powers of justices of supreme court at chambers.

166. Powers of district and county judges at chambers.

167. Powers of probate judges at chambers.

SEC. 165. The justices of the supreme court, and each of them, may, at chambers, grant all orders and writs which are usually granted in the first instance upon an ex parte application, and may, in their discretion, hear applications to discharge such orders and writs.

Powers of justices of supreme court at chambers.

SEC. 166. District and county judges, at chambers, may grant all orders and writs which are usually granted in the first instance upon ex parte applications, and may, at chambers, hear and dispose of such writs and of motions for new trials.

Powers of district and county judges at chambers.

SEC. 167. The judges of the probate court may, at chambers, appoint appraisers, receive inventories and accounts to be filed in the probate court; suspend the

Power of probate judges at chambers.

powers of executors, administrators or guardians, in the cases allowed by law; grant special letters of administration or guardianship; approve claims and bonds; and direct the issuance, from the probate courts, of all writs and process necessary in the exercise of their power.

Statutes of 1863, p. 339.

CHAPTER .III.

PARTICULAR DISQUALIFICATION OF JUDGES.

SECTION 170. When disqualified.

171. Not to act as attorney in his own court.

172. Certain judges not to act as attorneys.

173. No judicial officer to have a partner.

When disqualified.

SEC. 170. A judge cannot act as such in any of the following cases :

1. In an action or proceeding to which he is a party, or in which he is interested.

2. When he is related to either party, by consanguinity or affinity within the third degree, computed according to the rules of the civil law.

3. When he has been attorney or counsel for either party in the action or proceeding.

But this section does not apply to the arrangement of the calendar or the regulation of the order of business, nor to the power of transferring the cause to another county.

Statutes of 1863, p. 343.

Not to act as attorney in his own court

SEC. 171. A judge cannot act as attorney or counsel in a court in which he is judge, or in an action or proceeding removed therefrom to another court for review, or in an action or proceeding from which an appeal may lie to his own court.

Statutes of 1863, p. 343.

Certain judges not to act as attorneys.

SEC. 172. A justice of the supreme court, or judge of the district court, cannot act as attorney or counsel in any court of this state, except in an action or proceeding to which he is a party on the record.

Statutes of 1863, p. 343.

OF CALIFORNIA.

Sec. 173. No judge or other elective judicial officer, or district court commissioner, shall have a partner acting as attorney or counsel in any court of this state.

No judicial officer to have a partner.

Statutes of 1863, p. 343.

CHAPTER IV.

INCIDENTAL POWERS AND DUTIES OF JUDICIAL OFFICERS.

SECTION 176. General powers of judges out of court.

177. Powers of judicial officers as to conduct of proceedings before them.

178. Same.

179. Same.

Sec. 176. A judge may exercise, out of court, all the powers expressly conferred upon a judge as contradistinguished from the court.

General powers of judges out of court.

Sec. 177. Every judicial officer has power—

1. To preserve and enforce order in his immediate presence, and in the proceedings before him, when he is engaged in the performance of an official duty.

Proceedings of judicial officers as to conduct of proceedings before them. N. S.

2. To compel obedience to his lawful orders, as provided in this code.

3. To compel the attendance of persons to testify in a proceeding before him, in the cases and manner provided in this code.

4. To administer oaths to persons in a proceeding pending before him, and in all other cases where it may be necessary, in the exercise of his powers and duties.

Sec. 178. For the effectual exercise of the powers conferred by the last section, a judicial officer may punish for contempt, in the cases provided in this code.

Same.

Sec. 179. The justices of the supreme court, and the judges of the district and county courts, have power in any part of the state, and justices of the peace within their respective counties, and police judges and judges of municipal courts, within their respective cities or towns, to take and certify—

Same.

1. The proof and acknowledgment of a conveyance of real property, or of any other written instrument.
2. The acknowledgment of satisfaction of a judgment of any court.
3. An affidavit to be used in any court of justice in this state.

Statutes of 1863, p. 345.

CHAPTER V.

MISCELLANEOUS PROVISIONS RESPECTING COURTS AND JUDICIAL OFFICERS.

SECTION 182. Subsequent applications for orders, when prohibited.

183. Violation of last section.

184. No proceeding affected by a vacancy in office of judge, etc.

185. Proceedings to be in the English language, except in certain counties.

186. Abbreviations and figures.

187. Means to be used to execute judicial powers in certain cases.

Subsequent applications for orders, when prohibited.

SEC. 182. If an application for an order, made to a judge of a court in which the action or proceeding is pending, is refused in whole or in part, or is granted conditionally, no subsequent application for the same order can be made to any court commissioner or any other judge, except of a higher court; but nothing in this section applies to motions refused for any informality in the papers or proceedings necessary to obtain the order.

Statutes of 1863, p. 345.

Violation of last section.

SEC. 183. A violation of the last section may be punished as a contempt, and an order made contrary thereto may be revoked by the judge who made it, or vacated by a judge of the court in which the action or proceeding is pending.

Statutes of 1863, p. 345.

No proceeding affected by a vacancy in office of judge, etc.

SEC. 184. No proceeding in any court of justice, in an action or special proceeding pending therein, is affected by a vacancy in the office of all or any of the judges, or by the failure of a term thereof.

Statutes of 1863, p. 345.

SEC. 185. Every written proceeding in a court of justice in this state, or before a judicial officer, except in the counties of San Luis Obispo, Santa Barbara, Los Angeles and San Diego, must be in the English language, and in the excepted counties may be either in the English or Spanish language.

Proceedings to be in the English language, except in certain counties

Statutes of 1863, p. 345.

SEC. 186. Such abbreviations as are in common use may be used, and numbers may be expressed by figures or numerals in the customary manner.

Abbreviations and figures.

Statutes of 1863, p. 344.

SEC. 187. When jurisdiction is, by this code or by any other statute, conferred on a court or judicial officer, all the means *necessary* to carry it into effect are also given, and in the exercise of the jurisdiction, if the course of proceeding be not specifically pointed out by this code *or the statute*, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code.

Means to be used to execute judicial power in certain cases N. S.

NOTE.—This section is adopted from the New York code; the italicized words have been added by this commission.

TITLE III.

OF PERSONS SPECIALLY INVESTED WITH POWERS OF A JUDICIAL NATURE.

CHAPTER I. *Of jurors.*

II. *Of court commissioners.*

CHAPTER I.

OF JURORS.

ARTICLE I. JURORS IN GENERAL.

II. QUALIFICATIONS AND EXEMPTIONS OF JURORS.

III. MANNER OF SELECTING AND RETURNING JURORS FOR COURTS OF RECORD.

ARTICLE IV. TIME AND MANNER OF DRAWING JURORS FOR COURTS OF RECORD.

V. MANNER OF SUMMONING JURORS FOR COURTS OF RECORD.

VI. MANNER OF SUMMONING JURORS FOR COURTS NOT OF RECORD.

VII. MANNER OF SUMMONING JURIES OF INQUEST.

VIII. OBEDIENCE TO SUMMONS, HOW ENFORCED.

IX. OF IMPANELLING A GRAND JURY.

X. OF IMPANELLING TRIAL JURY IN COURTS OF RECORD.

XI. OF IMPANELLING A TRIAL JURY IN COURTS NOT OF RECORD.

XII. OF IMPANELLING JURIES OF INQUEST.

ARTICLE I.

JURORS IN GENERAL.

SECTION 190. Jury defined.

191. Different kinds of juries.

192. Grand jury defined.

193. Trial jury defined.

194. Number of a trial jury.

195. Jury of inquest defined.

Jury defined SEC. 190. A jury is a body of men temporarily selected from the citizens of a particular district, and invested with power to present or indict a person for a public offence, or to try a question of fact.

Different kinds of juries. SEC. 191. Juries are of three kinds :
 1. Grand juries.
 2. Trial juries.
 3. Juries of inquest.

Grand jury defined. SEC. 192. A grand jury is a body of men, not less than thirteen nor more than fifteen in number, returned at stated periods from citizens of the county, before a court of competent jurisdiction, and sworn to inquire of public offences committed or triable within the county.

Statutes of 1863, p. 630.

Trial jury defined. SEC. 193. A trial jury is a body of men, returned from the citizens of a particular district, before a court or officer of competent jurisdiction, and sworn to try and determine, by a unanimous verdict, a question of fact.

Number of a trial jury. SEC. 194. A trial jury consists of twelve men, unless the parties to the action or proceeding agree upon a less number.

SEC. 195. A jury of inquest is a body of men, summoned from the citizens of a particular district, before the sheriff, coroner or other ministerial officer, to inquire of particular facts. Jury of inquest defined

ARTICLE II.

QUALIFICATIONS AND EXEMPTIONS OF JURORS.

SECTION 198. Who are competent to act as jurors.

199. Who are not competent to act as jurors.

200. Who are exempt.

201. Who may be excused.

SEC. 198. A person is competent to act as a juror if he be— Who are competent to act as jurors.

1. A citizen of the United States, an elector of the county, and a resident of the township at least three months before being selected and returned.

2. In possession of his natural faculties and not decrepit.

3. Possessed of sufficient knowledge of the language in which the proceedings of the courts are had; but this requirement does not apply to the counties of Monterey, San Luis Obispo, Santa Barbara, Los Angeles, San Bernardino and San Diego.

4. Assessed on the last assessment roll of his county, on property belonging to him, if a resident at the time of the assessment.

Statutes of 1863, p. 630; 1864, p. 462; 3 Cal. 107; 4 Cal. 175; 6 Cal. 405; 17 Cal. 320.

SEC. 199. A person is not competent to act as a juror—

1. Who does not possess the qualifications prescribed by the preceding section. Who are not competent to act as jurors.

2. Who has been convicted of a felony or misdemeanor, involving moral turpitude.

3. Who follows gambling as a business.

Statutes of 1863, p. 630.

SEC. 200. A person is exempt from liability to act as a juror, if he be— Who are exempt.

1. A judicial, civil, or military officer of the United States or of the state of California.

2. A person holding a county office.
3. An attorney and counsellor at law.
4. A minister of the gospel or a priest of any denomination.
5. A teacher in a college, academy or school.
6. A practising physician.
7. An officer, keeper or attendant of an almshouse, hospital, asylum or other charitable institution.
8. Engaged in the performance of duty as officer or attendant of a county jail or the state prison.
9. Employed on board of a vessel navigating the waters of this state.
10. An express agent, mail carrier, telegraph operator or keeper of a public ferry or toll gate.
11. An active member of the fire department of any city, town or village in this state, or an exempt member by reason of five years active service.
12. A superintendent, engineer or conductor on a railroad.

Statutes of 1863, p. 630 ; 1853, p. 59 ; 1866, p. 30 ; 1862, p. 362.

NOTE.—Subdivision 12 is new.

Who may be excused.

SEC. 201. A juror cannot be excused by the court for slight or trivial cause, or for hardship, or inconvenience to his business, but only when material injury or destruction to his property, or that of the public intrusted to him, is threatened, or when his own health, or the sickness or death of a member of his family, requires his absence.

Statutes of 1863, p. 630.

ARTICLE III.

MANNER OF SELECTING AND RETURNING JURORS FOR COURTS OF RECORD.

SECTION 204. List of persons to serve as jurors to be made by supervisors.

205. How selection shall be made.

206. List to contain one name for every hundred inhabitants.

207. Person who served as juror during preceding year not to be selected.

208. List to be placed with clerk.

209. Duty of clerk on receiving lists.

210. Regular jurors to serve one year.

211. Upon receiving new lists, old ones to be destroyed.

SEC. 204. The board of supervisors of each county must, at their first regular meeting in each year, or at any other meeting if neglected at the first, make a list of persons to serve as jurors in the courts of record for the ensuing year.

List of persons to serve as jurors to be made by supervisors.

SEC. 205. They must proceed to select and list from those assessed on the assessment roll of the previous year, suitable persons, competent to serve as jurors; and, in making such selection, they must take the names of such only as are not exempt from serving, who are in possession of their natural faculties, and not infirm or decrepit, of fair character, of approved integrity, and of sound judgment.

How selection shall be made.

SEC. 206. Such lists must contain not less than one for every hundred inhabitants of each township or ward, having regard to the population of the county, so that the whole number of jurors selected in the county shall amount, at least, to one hundred, and not exceed one thousand.

List to contain one name for every 100 inhabitants.

SEC. 207. In making such selection, the board must not select any of the same persons who actually served as jurors at any term of court during the preceding year; and if such persons are drawn and returned to serve as trial jurors, it will be the duty of the court to strike the names of such persons from the list of jurors, and direct the sheriff to fill up the list from among the neighboring citizens competent to serve as jurors; and in counties having ten thousand or more inhabitants, it shall be a good cause of challenge that any trial juror, whether on the regular panel or taken from among the bystanders, has served as a trial juror at any time within the year next preceding the making of the list of persons to serve as jurors as hereinbefore provided.

Person who served as juror during preceding year not to be selected.

SEC. 208. Certified lists of the persons selected to serve as jurors must at once be placed in the possession of the county clerk.

List to be placed with clerk.

SEC. 209. On receiving such lists, the clerk must file the same in his office, and write down the names contained therein on separate pieces of paper, of the same

Duty of clerk on receiving lists.

size and appearance, and fold each piece so as to conceal the name thereon, and deposit them in a box to be called the "jury box."

Regular jurors to serve one year.

SEC. 210. The persons whose names are so returned are known as regular jurors, and must serve for one year and until other persons are selected and returned.

Upon receiving new lists, old ones to be destroyed.

SEC. 211. Upon receiving new lists, the clerk must destroy the ballots deposited in the jury box for the preceding year, and deposit the ballots containing the names entered on such new lists in the manner required by section two hundred and nine.

ARTICLE IV.

TIME AND MANNER OF DRAWING JURORS FOR COURTS OF RECORD.

SECTION 214. Jury to be drawn upon the order of the judge.

215. Clerk to notify county judge and sheriff of time of drawing.

216. Sheriff and judge to witness drawing.

217. Drawing, when to be adjourned.

218. Shall proceed, when.

219. Drawing, how conducted.

220. After adjournment of court, disposition to be made of ballots.

221. Copy of list to be furnished by clerk.

Jury to be drawn upon the order of the judge.

SEC. 214. Not less than ten nor more than thirty days before the commencement of any term of court, the judge thereof, if a jury will be required therefor, must make and file with the county clerk an order that one be drawn. The number to be drawn must be fixed in the order; if to form a grand jury, it must be twenty-four, and if a trial jury, such number as the judge may direct.

Clerk to notify county judge and sheriff of time of drawing.

SEC. 215. At least one day before the drawing, the clerk must notify the sheriff and county judge of the time when such drawing will take place, which time must not be more than three days after the receipt by him of the order for such drawing.

Sheriff and judge to witness drawing.

SEC. 216. At the time so appointed, the sheriff, in person or by deputy, and the county judge, must attend at the county clerk's office, to witness such drawing, and if

they do so, the clerk must, in their presence, proceed to draw the jurors.

SEC. 217. If the officers so notified do not appear, the clerk must adjourn the drawing until the next day, and, by written notice, require two electors of the county to attend such drawing on the adjourned day.

Drawing,
when to be
adjourned.

SEC. 218. If, at the adjourned day, the sheriff, county judge and electors, or any two of such persons, appear, the clerk must in their presence proceed to draw the jurors.

Shall pro-
ceed, when.

SEC. 219. The clerk must conduct such drawing as follows :

Drawing,
how con-
ducted.

1. He must shake the box containing the names of jurors returned to him, from which jurors are required to be drawn, so as to mix the slips of paper upon which such names were written, as much as possible.

2. He must then publicly draw out of the box as many such slips of paper as are ordered by the judge.

3. A minute of the drawing must be kept by one of the attending officers, in which must be entered the name contained on every slip of paper so drawn, before any other slip is drawn.

4. If, after drawing the whole number required, the name of any person has been drawn who is dead or insane, or who has permanently removed from the county, to the knowledge of the clerk or any other attending officer, an entry of such fact must be made in the minute of the drawing, and the slip of paper containing such name must be destroyed.

5. Another name must then be drawn, in place of that contained on the slip of paper so destroyed, which must, in like manner, be entered in the minutes of the drawing.

6. The same proceedings must be had as often as may be necessary, until the whole number of jurors required are drawn.

7. The minute of the drawing must then be signed by the clerk and the attending officers or persons, and filed in the clerk's office.

8. Separate lists of the names of the persons so drawn for trial jurors, and of those drawn for grand jurors, with

their places of residence, and specifying for what court they were drawn, must be made and certified by the clerk and the attending officers or persons, and delivered to the sheriff of the county.

After adjournment of court, disposition to be made of ballots.

SEC. 220. After the adjournment of any court at which jurors have been returned, as herein provided, the clerk must inclose the ballots containing the names of those who attended and served as jurors, in an envelop, under seal, and the ballots of those who did not attend and serve must be returned to the jury box. The ballots sealed in envelops must not be returned to the jury box until all the ballots therein have been exhausted.

Copy of list to be furnished by clerk.

SEC. 221. The county clerk must furnish any person applying therefor, and paying the fees allowed by law for the same, a copy of the list of jurors drawn to attend any court.

ARTICLE V.

MANNER OF SUMMONING JURORS FOR COURTS OF RECORD.

SECTION 225. Sheriff to summon jurors, how.

226. Court may order jury drawn, when.

227. When jury may be completed from bystanders.

Sheriff to summon jurors, how.

SEC. 225. As soon as he receives the list of jurors drawn, the sheriff must summon the persons named therein to attend, by giving personal notice to each, or by leaving a written notice at his place of residence, with some person of proper age, and must return the list to the court at the opening thereof, specifying the names of those who were summoned and the manner in which each person was notified.

Court may order jury drawn, when

SEC. 226. Whenever jurors are not drawn and summoned to attend any court of record, or a sufficient number of jurors fail to appear, such court may, in its discretion, order a sufficient number to be forthwith drawn and summoned to attend such court; or it may, by an order entered on its minutes, direct the sheriff of the county forthwith to summon so many good and lawful men of his county to serve as jurors as the case may require. And

in either case such jurors must be summoned in the manner provided by the preceding section.

Sec. 227. When there are not competent jurors enough present to form a panel, the court may direct the sheriff or other proper officer to summon a sufficient number of persons, having the qualification of jurors, to complete the panel, from among the bystanders, or from among the neighboring citizens, and the sheriff must summon the number so ordered, accordingly, and return the names to the court.

When jury may be completed from bystanders.

ARTICLE VI.

MANNER OF SUMMONING JURORS FOR COURTS NOT OF RECORD.

SECTION 230. Jurors for police and justices' courts, by whom summoned.

231. How summoned.

232. Officer's return.

Sec. 230. When jurors are required in any police or justice's court, they must, upon the order of the judge or justice thereof, be summoned by the sheriff, marshal, policeman or constable of the jurisdiction.

Jurors for police and justices' courts, by whom summoned

Sec. 231. Such jurors must be summoned from the persons resident of the city or township, competent to serve as jurors, by notifying them orally that they are so summoned, and of the time and place at which their attendance is required.

How summoned.

Sec. 232. The officer summoning such jurors must, at the time fixed in the order for their appearance, return it with a list of the persons summoned indorsed thereon.

Officer's return.

ARTICLE VII.

MANNER OF SUMMONING JURIES OF INQUEST.

SECTION 235. How summoned.

Sec. 235. Juries of inquest must be summoned by the officer before whom the proceedings are had, or any sheriff, policeman or constable, from the persons resident of

How summoned.

the county, competent to serve as jurors, by notifying them orally that they are so summoned, and of the time and place at which their attendance is required.

ARTICLE VIII.

OBEDIENCE TO SUMMONS, HOW ENFORCED.

SECTION 238. Obedience to summons, how enforced.

Obedience to
summons,
how enforced

SEC 238. Any juror summoned, who wilfully, and without reasonable excuse, fails to attend, may be attached and compelled to attend, and the court may also impose a fine not exceeding one hundred dollars, upon which execution may issue. If the juror was not personally served, the fine must not be imposed until, upon an order to show cause, an opportunity has been offered the juror to be heard.

Statutes of 1863, p. 630.

ARTICLE IX.

OF IMPANELLING A GRAND JURY.

SECTION 241. Grand jury, when to be impanelled.

242. Grand jury, how constituted.

243. Jury to be impanelled as prescribed in penal code.

Grand jury,
when to be
impanelled.

SEC. 241. At the opening of each regular term of the county court (unless otherwise directed by the judge), and as often thereafter as to the judge may seem proper, a grand jury may be impanelled.

Grand jury,
how consti-
tuted.

SEC. 242. When, of the jurors summoned, not less than thirteen nor more than fifteen attend, they shall constitute the grand jury. If more than fifteen attend, the clerk must call over the list summoned, and the fifteen first answering shall constitute the grand jury. If less than thirteen attend, the panel may be filled to fifteen as provided in section two hundred and twenty-six.

Jury to be
impanelled
as prescribed
in penal code

SEC. 243. Thereafter such proceedings shall be had in impanelling the grand jury as are prescribed in part two of the penal code.

ARTICLE X.

OF IMPANELLING TRIAL JURY IN COURTS OF RECORD.

SECTION 246. Clerk to call list of jurors summoned, etc.

247. Jury to be impanelled as prescribed in part two.

SEC. 246. At the opening of court, on the day trial jurors have been summoned to appear, the clerk must call the names of those summoned, and the court may then hear the excuses of jurors summoned. The clerk must then write the names of the jurors present and not excused, upon separate slips or ballots of paper, and fold such slips so that the names are concealed, and then, in the presence of the court, deposit the slips or ballots in a box, which must be kept sealed until ordered by the court to be opened.

Clerk to call list of jurors summoned, etc.

SEC. 247. When thereafter an action is called for trial by the court, such proceedings shall be had in impanelling the trial jury as are prescribed in part two of this code.

Jury to be impanelled as prescribed in part II.

ARTICLE XI.

OF IMPANELLING A TRIAL JURY IN COURTS NOT OF RECORD.

SECTION 250. Proceedings in forming jury in courts not of record.

251. How impanelled.

SEC. 250. At the time appointed for a jury trial, in police or justices' courts, the list of jurors summoned must be called, and the names of those attending must be written upon separate slips of paper, folded so as to conceal the names, and placed in a box, from which the trial jury must be drawn.

Proceedings in forming jury in courts not of record

SEC. 251. Thereafter, if the action is a criminal one, the jury must be impanelled as provided in the penal code. If a civil one, as provided in part two of this code.

How impanelled.

ARTICLE XII.

OF IMPANELLING JURIES OF INQUEST.

SECTION 254. Mode and manner of impanelling.

Mode and
manner of
impanelling.

SEC. 254. The mode and manner of impanelling juries of inquest are provided for in the provisions of the different codes relating to such inquests.

NOTE.—The commissioners report the preceding chapter as a substitute for existing statutes on the same subject. We have now a jury law applicable to thirty-three counties; another, entirely different in its provisions, applicable to sixteen counties; and still another, differing from both, applicable to San Francisco alone (Stat. 1861, p. 573; 1863, p. 630; 1864, p. 524), and various statutes of local application. No one will doubt the propriety of substituting, when it can be done, laws general in their operation for those of local application merely. We think this one of the instances in which it can and ought to be done.

CHAPTER II.

OF COURT COMMISSIONERS.

SECTION 258. Court commissioners, how appointed.

259. Powers of court commissioners.

Court com-
missioners,
how ap-
pointed.

SEC. 258. The district courts may appoint, for each county of their respective districts, a commissioner, to be designated as "court commissioner" of the county. If portions of a single county are assigned to different districts, then a commissioner may be appointed to reside in each portion of the county thus assigned.

Statutes of 1863, p. 338; 1864, p. 229.

Powers of
court com-
missioners.

SEC. 259. Every such commissioner has power—

1. To hear and determine ex parte motions for orders and writs (except orders or writs of injunction) in the district and county courts of the county for which he is appointed.

2. To take proof and report his conclusions thereon, as to any matter of fact, other than an issue of fact raised on the pleadings, upon which information is required by the court; but any party to the proceedings may except

to such report within four days after written notice that the same has been filed, and may argue his exceptions before the court, on giving notice of motion for that purpose.

3. To take and approve bonds and undertakings whenever the same may be required in actions or proceedings in such district and county courts, and to examine the sureties thereon when an exception has been taken to their sufficiency, and to administer oaths and affirmations, and take affidavits and depositions in any action or proceeding in any of the courts of this state, or in any matter or proceeding whatever.

Statutes of 1863, p. 338; 1864, p. 229.

NOTE.—We have purposely omitted “commissioners in equity.”

TITLE IV.

OF THE MINISTERIAL OFFICERS OF THE COURTS OF JUSTICE.

CHAPTER I. *Of ministerial officers generally.*

II. *Of the secretary and bailiff of the supreme court.*

III. *Of phonographic reporters.*

CHAPTER I.

OF MINISTERIAL OFFICERS GENERALLY.

SECTION 262. Election, powers and duties, where prescribed.

SEC. 262. The modes of election, powers and duties of the attorney-general, clerk of the supreme court, reporter of the supreme court, clerks, sheriffs and coroners, are prescribed in the political and penal codes.

Election,
powers and
duties, where
prescribed.

CHAPTER II.

OF THE SECRETARY AND BAILIFF OF THE SUPREME COURT.

SECTION 265. Justices may appoint.

266. Tenure and duties.

Justices may
appoint.

SEC. 265. The justices of the supreme court may appoint a secretary and bailiff.

Tenure and
duties.

SEC. 266. The secretary and bailiff hold their offices at the pleasure of the justices, and must perform such duties as may be required of them by the court or any justice thereof.

CHAPTER III.

OF PHONOGRAPHIC REPORTERS.

SECTION 269. How appointed, and duty.

270. Report prima facie correct.

271. Compensation.

How ap-
pointed, and
duty.

SEC. 269. The judge of each judicial district, each county judge, and the judge of the municipal criminal court of the city and county of San Francisco, may appoint a short hand reporter, to hold office during the pleasure of the judge, and who must, at the request of either party, or in the discretion of the court, in a civil case or in criminal cases, on the order of the court, take down in short hand all the testimony, the rulings of the court and the exceptions taken, and oral instructions given, and must, within five days, or such reasonable time after the trial of such case as the court may designate, write out the same in plain, legible, long hand writing, verify and file it, together with the original short hand writing, with the clerk of the court in which the case was tried.

Statutes of 1866, p. 232.

Report
prima facie
correct.

SEC. 270. His report, written out in long hand writing, is prima facie a correct statement of the evidence and proceedings.

Statutes of 1866, p. 232.

SEC. 271. He shall receive, as compensation for his services, not exceeding ten dollars per day for taking notes, and not exceeding twenty cents per folio for transcription, to be paid by the party in whose favor judgment is rendered, and be taxed up by the clerk of the court as costs against the party against whom judgment is rendered. In cases where a transcript may be required by the court, the expense thereof must be paid equally by the respective parties to the action, or either of them, in the discretion of the court; and no verdict or judgment can be entered up, except the court shall otherwise order, until the reporter's fees are paid, or a sum equivalent thereto deposited with the clerk of the court. In no case shall the transcript be paid for unless specially ordered by either plaintiff or defendant, or by the court; nor shall the reporter be required, in any civil case, to transcribe his notes until the compensation per folio therefor be tendered to him or deposited in court for that purpose. In criminal cases, when the testimony has been taken down by order of the court, the compensation of the reporter must be fixed by the court and paid out of the treasury of the county in which the case is tried, upon the order of the court.

Compensa-
tion.

Statutes of 1868, p. 455.

TITLE V.

OF PERSONS SPECIALLY INVESTED WITH MINISTERIAL POWERS RELATING TO COURTS OF JUSTICE.

CHAPTER I. *Attorneys and counsellors at law.*

II. *Of other persons invested with such powers.*

CHAPTER I.

ATTORNEYS AND COUNSELLORS AT LAW.

SECTION 274. Who may be admitted as attorneys.

275. Qualifications.

276. Certificate of admission. License.

SECTION 277. Admission to district and county courts.

- 278. Oath.
- 279. Attorneys of other states.
- 280. Roll of attorneys.
- 281. Penalty for practising without license.
- 282. General duties.
- 283. Authority of attorney.
- 284. Change of attorney.
- 285. Notice of change.
- 286. Death or removal of attorney.
- 287. Removal and suspension.
- 288. Conviction of felony. Moral turpitude.
- 289. Proceedings for removal or suspension.
- 290. Accusation.
- 291. Verification.
- 292. Citation to answer.
- 293. Appearance.
- 294. How to answer
- 295. Demurrer.
- 296. Answer.
- 297. Trial.
- 298. Reference.
- 299. Judgment.

Who may be
admitted as
attorneys.

SEC. 274. Any white male citizen, or white male person who has bona fide declared his intention to become a citizen in the manner required by law, of the age of twenty-one years, of good moral character, and who possesses the necessary qualifications of learning and ability, is entitled to admission as attorney and counsellor in all courts of this state.

Statutes of 1851, p. 48.

Qualifica-
tions.

SEC. 275. Every applicant for admission as attorney and counsellor must produce satisfactory testimonials of good moral character, and undergo a strict examination in open court, as to his qualifications, by the justices of the supreme court.

Certificate of
admission.

SEC. 276. If, upon examination, he is found qualified, the court must admit him as attorney and counsellor in all the courts of this state, and shall direct an order to be entered to that effect upon its records, and that a certificate of such record be given to him by the clerk of the court, which certificate is his license.

License.

Admission
to district
and county
courts.

SEC. 277. The district and county courts of this state are authorized, to admit, as attorney and counsellor in their respective courts, any white male citizen, or white male

person who has bona fide declared his intention to become a citizen, of the age of twenty-one years, and of good moral character, who possesses the requisite qualifications, on similar testimonials and like examinations as are required by the preceding section for admission by the supreme court, and may direct their clerks to give a certificate of such admission, which certificate shall be a license to practise in such courts.

SEC. 278. Every person, on his admission, must take an oath to support the constitution of the United States and of this state, and to discharge the duties of attorney and counsellor to the best of his knowledge and ability. A certificate of such oath must be indorsed on the license.

SEC. 279. Every white male citizen of the United States, who has been admitted to practise law in the highest court of a sister state, may be admitted to practise in the courts of this state, upon the production of his license and satisfactory evidence of good moral character; but the court may examine the applicant as to his qualifications.

Attorneys of other states.

SEC. 280. Each clerk must keep a roll of attorneys and counsellors of the court of which he is clerk.

Roll of attorneys.

SEC. 281. If any person shall practise law in any court, except a justice's or police court, without having received a license as attorney and counsellor, he is guilty of a contempt of court.

Penalty for practising without license.

SEC. 282. It is the duty of an attorney and counsellor—

General duties.

1. To support the constitution and laws of the United States and of this state.

2. To maintain the respect due to the courts of justice and judicial officers.

3. To counsel or maintain such actions, proceedings or defences only as appear to him legal or just, except the defence of a person charged with a public offence.

4. To employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth, and never to seek to mislead the judges by an artifice or false statement of fact or law.

General
duties.

5. To maintain inviolate the confidence, and at every peril to himself, to preserve the secrets of his client.

6. To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged.

7. Not to encourage either the commencement or the continuance of an action or proceeding from any motive of passion or interest.

8. Never to reject, for any consideration personal to himself, the cause of the defenceless or the oppressed.

NOTE.—The provisions of this section are taken substantially from the oath prescribed to advocates by the laws of Geneva. That oath is as follows :

“ I swear before God,

“ To be faithful to the republic and the canton of Geneva ;

“ Never to depart from the respect due to the tribunals and authorities ;

“ Never to counsel or maintain a cause which does not appear to be just or equitable, unless it be the defence of an accused person ;

“ Never to employ knowingly, for the purpose of maintaining the causes confided to me, any means contrary to truth, and never to seek to mislead the judges by any artifice or false statement of fact or law ;

“ To abstain from all offensive personality, and to advance no fact contrary to the honor or reputation of the parties, if it be not indispensable to the cause with which I may be charged ;

“ Not to encourage either the commencement or the continuance of a suit from any motive of passion or interest ;

“ Not to reject, for any considerations personal to myself, the cause of the weak, the stranger or the oppressed.”

Say the commissioners of New York :

“ This appears to us to express so justly the general duties of lawyers, that we cannot do better than take almost the very terms of it in prescribing their duties.

“ The profession of a lawyer is essential to society. Its character and honor are public interests. Not only is the advice of lawyers necessary in the more difficult transactions of private life, but their intervention is necessary to represent the suitor, and advocate his rights before the courts. In this position everything is confided to their integrity. The magnitude of the interests placed in their hands—property, character, liberty, life—the responsibility which they assume, the confidence which they receive, all demand and presuppose the highest qualities and character. No dishonest or dishonorable man can retain the confidence of honest and honorable men. The most intimate connection, in reality, subsists between the character of the community and the character of the bar. An unscrupulous bar could not exist in a high-minded community ; and if anywhere a corrupt legal profession is to be found, it is found in the midst of a corrupt and corrupting people.

“ The judicial department is recruited from the legal profession. Judges must be lawyers. This circumstance alone, the mere fact that one of the great departments of government, co-ordinate in power, equal in dignity, and the one upon which especially the safety of the citizen depends, is, by the law of its condition, eligible only out of the ranks of

one profession, is enough to give it a pre-eminence. The integrity of the judiciary, more than that of any other class of magistrates, is evidence of the soundness of the public mind. The character of the judges, however, is the character of the lawyers. Made at the bar, their moral characters there take their complexion. To degrade the bar, therefore, leads directly and inevitably to the degradation of the bench.

"There are certain grave errors somewhat current respecting the duties of lawyers, which deserve serious consideration. We refer particularly to their alleged indifference to the moral aspects of the causes they advocate—not that there is anything like the indifference which is supposed to exist. On the contrary, persons more scrupulously exact never to take part with wrong, or seem to do so, cannot be found in any profession. But there is nevertheless an impression widely diffused, not only in the profession but out of it, that a lawyer may properly advocate a bad cause. This view of the case we here venture briefly to consider.

"When a lawyer is asked for his opinion upon a purely legal question, his duty ends with stating the law as it is. In many instances, however, more than this is asked. His client seeks his advice respecting his future conduct. In such cases, his duty as a moral being requires him to advise justice. His position as a legal adviser does not exempt him from the moral duties which bind other men. He has no more right than another friend to advise what is unjust or oppressive. Undoubtedly the client must judge for himself of the moral quality of his own actions, and if he desires no more than to know what course the law requires under particular circumstances, the adviser's duty ends with explaining that. But in practice the client generally expects and asks more. He asks advice from a friend who knows what his legal rights are, and who probably has more of his confidence than any other person. In such circumstances, he is bound by moral and should be bound by human laws, to throw his influence upon the side of integrity. To assent to the bad scheme of an unjust client is to become equally guilty with him, and the two are as much conspirators to effect as if they had originally concocted a plan of iniquity with the view of sharing in the plunder. And when, in addition to advice, the client wants an advocate and asks for active co-operation, the same laws bind him just as strongly to refrain from pursuing an unjust object.

"It is sometimes said that a lawyer is not at liberty to refuse his services to any person, and that when once engaged he is at liberty to employ every means in his power for his client. Indeed, so eminent a person as Lord Brougham, is reported to have said, in a speech in the British house of lords, that the advocate is bound to forget that there is any other person in the world besides his client, and to lose sight of every other consideration than of success.

"Is it possible that this can be just? Should the advocate forget that there is a society whose welfare he is bound by the highest sanctions to promote; that there are other parties whose rights are at stake; that there are duties to society, to every member of it, as well as to the one who retained him?

"The doctrine appears to us unsound in theory, and most pernicious in practice. It assumes that a man has a right to whatever the law can give him, that the law is so plain that it cannot be mistaken or perverted, and that one may rightfully avail himself of every defect in an adversary's proof which the rules of evidence, or accident or time may have created; three propositions, every one of which is without foundation. Suppose that a client makes claim to land in the possession and apparent ownership of another, whose evidence of title, however, has been destroyed by

accident. The advocate knows from confidential communications made to him as counsel, that his client has not a just claim to the land; but, from defect of proof on the part of the possessor, it is easy for him to recover it. If the client asks it, is he bound to assist him? Few persons will maintain that. But if the doctrine is a sound one, does it not embrace this case? There is, as it strikes us, no middle ground. If the advocate is to overlook the moral aspects of the claim he must recover this property for his client. Putting so extreme a case tests the principle, and shows it to be unsound, by showing that it leads to a consequence so revolting.

"The law, moreover, is not so clear and precise but that it may be mistaken or perverted. A strong mind at the bar and a weak one on the bench lead often to erroneous judgments. The argument we oppose takes for granted the infallibility of judges and the certainty of law. Who, conversant with the proceedings of courts, does not know that neither can be counted on? Before ordinary tribunals, more depends on the advocate than is generally imagined.

"Is it lawful to use the power of reason and eloquence to sustain a bad cause, to support the guilty, or, what is more revolting, to persecute innocence? May the faculties be abused, and learning perverted, to make false reasons seem true, to cover up weak points, to give undue prominence to some facts, to conceal others, to magnify one's own cause, to vilify an adversary's? To hold this proceeds upon the fallacy that truth and right cannot be misrepresented or concealed. Who does not know the contrary?

"If it be said that it is the duty of an advocate to go no further than to present the cause of his client truly, leaving the results to the courts and juries, it may be answered that truth is absolute, not relative. To present a case truly requires the whole truth on both sides, as well that which makes against as that which makes for a client. If he present the favorable circumstances and suppress the unfavorable, does he present the case truly? Does he not rather impose a false impression on those who have to judge?

"We by no means assert that an advocate may not take upon himself the defence of a man whom he believes to be guilty. He may. The section we propose permits him to do so. If he have derived his belief from the confession of the accused, he should pause in assuming his defence. The law gives to every man charged with crime the benefit of the rule that his innocence is to be presumed by his judges, until the prosecution have established his guilt by proof beyond a reasonable doubt. Of this rule the advocate is the intermediate minister. Notwithstanding his own conjectures, surmises or even belief as to the guilt of his client, he may not become his judge; but is justified, if not bound, to enforce its application to the inconclusiveness of the evidence of guilt. He may do this the more readily, because even the jury themselves are bound to secure to the accused the benefit of its application. He may also undertake to show the circumstances of his case, to present the palliating circumstances of temptation, or of provocation, or anything else that may affect the moral quality of the action or determine the degree of punishment. He may also, in civil cases, present defences recognized and provided by law, although he may himself disapprove of the principle and policy of the law.

"But here the advocate should stop. The law and all its machinery are means, not ends; the purpose of their creation is justice; and he who, in his zeal for the means, forgets the ends, betrays not only an unsound heart but an unsound understanding."

1. To bind his client in any of the steps of an action or proceeding, by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise.

2. To receive money claimed by his client in an action or proceeding, during the pendency thereof, or within one year after judgment, and upon the payment thereof, and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment.

SEC. 284. The attorney in an action or special proceeding may be changed at any time before judgment or final determination, as follows:

Change of attorney.

1. Upon his own consent, filed with the clerk or entered upon the minutes.

2. Upon the order of the court or judge thereof, upon the application of the client.

SEC. 285. When an attorney is changed, as provided in the last section, written notice of the change and of the substitution of a new attorney, or of the appearance of the party in person, must be given to the adverse party; until then, he must recognize the former attorney.

Notice of change.

SEC. 286. When an attorney dies, or is removed or suspended, or ceases to act as such, a party to an action for whom he was acting as attorney must, before any further proceedings are had against him, be required by the adverse party, by written notice, to appoint another attorney or to appear in person.

Death or removal of attorney.

SEC. 287. An attorney and counsellor may be removed or suspended by the supreme court, and by the district courts of the state, for either of the following causes, arising after his admission to practise:

Removal and suspension.

1. His conviction of a felony, or misdemeanor involving moral turpitude, in which case the record of conviction is conclusive evidence.

2. Wilful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, and any violation of the oath taken by him or of his duties as such attorney and counsellor.

In all cases where an attorney is removed or suspended

by a district court, he may appeal to the supreme court, and the judgment or order of the district court is subject, on such appeal, to review, as in civil actions.

Conviction
of felony.
Moral
turpitude.

SEC. 288. In case of the conviction of an attorney or counsellor of a felony, or misdemeanor involving moral turpitude, the clerk of the court in which a conviction is had must, within thirty days thereafter, transmit to the supreme court a certified copy of the record of conviction.

Proceedings
for removal
or suspen-
sion.

SEC. 289. The proceedings to remove or suspend an attorney and counsellor, under the first subdivision of section two hundred and eighty-seven, must be taken by the court on the receipt of a certified copy of the record of conviction; the proceedings under the second subdivision of section two hundred and eighty-seven may be taken by the court for matters within its knowledge, or may be taken upon the information of another.

Accusation.

SEC. 290. If the proceedings are upon the information of another, the accusation must be in writing.

Verification.

SEC. 291. The accusation must state the matters charged, and be verified by the oath of some person, to the effect that the charges therein contained are true.

Citation to
answer.

SEC. 292. After receiving the accusation, the court must, if in its opinion the case require it, make an order requiring the accused to appear and answer the accusation, at a specified time in the same or subsequent term, and must cause a copy of the order and of the accusation to be served upon the accused within a prescribed time before the day appointed in the order.

Appearance.

SEC. 293. The accused must appear at the time appointed in the order, and answer the accusation, unless for sufficient cause the court assign another day for that purpose; if he do not appear, the court may proceed and determine the accusation in his absence.

How to
answer.

SEC. 294. The accused may answer to the accusation, either by objecting to its sufficiency or denying it.

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SEC. 295. If he object to the sufficiency of the accusation, the objection must be in writing, but need not be in any specific form, it being sufficient if it presents intelligibly the grounds of the objection. If he deny the accusation, the denial may be oral and without oath, and must be entered upon the minutes. Demurrer.

SEC. 296. If an objection to the sufficiency of the accusation is not sustained, the accused must answer forthwith. Answer.

SEC. 297. If the accused plead guilty, or refuse to answer the accusation, the court must proceed to judgment of removal or suspension. If he deny the matters charged, the court must, at such time as it may appoint, proceed to try the accusation. Trial.

SEC. 298. The court may, in its discretion, order a reference to a committee to take depositions in the matter. Reference.

SEC. 299. Upon conviction, in cases arising under the first subdivision of section two hundred and eighty-seven, the judgment of the court must be that the name of the party be stricken from the roll of attorneys and counsellors of the court, and he be precluded from practising as such attorney or counsellor in all the courts of this state; and, upon conviction in cases under the second subdivision of section two hundred and eighty-seven, the judgment of the court may be according to the gravity of the offence charged--deprivation of the right to practise as attorney or counsellor in the courts of this state, permanently or for a limited period. Judgment.

CHAPTER II.

OF OTHER PERSONS INVESTED WITH SUCH POWERS.

SECTION 304. Receivers and guardians.

SEC. 304. The appointment, powers and duties of receivers and guardians, are provided for and prescribed in parts two and three of this code. Receivers and guardians.

PART II.

OF CIVIL ACTIONS.

PART II.

OF CIVIL ACTIONS.

TITLE I.

OF THE FORM OF CIVIL ACTIONS.

SECTION 307. One form of civil action only.

308. Parties to actions, how designated.

309. Special issues not made by pleadings, how tried.

SEC. 307. (§ 1.) There is in this state but one form of civil actions for the enforcement or protection of private rights and the redress or prevention of private wrongs.

One form of civil action only.

NOTE.—Probate proceedings are not civil actions (Estate of Scott, 15 Cal. 220), and they are therefore placed under the division (part III) of this code relating to special proceedings.

SEC. 308. (§ 2.) In such action the party complaining is known as the plaintiff, and the adverse party, as the defendant.

Parties to actions, how designated

SEC. 309. (§ 3.) A question of fact not put in issue by the pleadings may be tried by a jury, upon an order for the trial stating distinctly and plainly the question of fact to be tried; and such order is the only authority necessary for a trial.

Special issues not made by pleadings, how tried.

TITLE II.

OF THE TIME OF COMMENCING CIVIL ACTIONS.

CHAPTER I. *The time of commencing actions in general.*

II. *The time of commencing actions for the recovery of real property.*

CODE OF CIVIL PROCEDURE

CHAPTER III. *The time of commencing actions other than for the recovery of real property.*

IV. *General provisions as to the time of commencing actions.*

CHAPTER I.

THE TIME OF COMMENCING ACTIONS IN GENERAL.

SECTION 312. Commencement of civil actions.

Commence-
ment of civil
actions.

SEC. 312. Civil actions can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, except where, in special cases, a different limitation is prescribed by statute.

Statutes of 1850, p. 343.

CHAPTER II.

THE TIME OF COMMENCING ACTIONS FOR THE RECOVERY OF REAL PROPERTY.

SECTION 315. When the people will not sue.

316. When action cannot be brought by grantee from the state.

317. When actions by the people or their grantees are to be brought within five years.

318. Seizin within five years, when necessary in action for real property.

319. Such seizin, when necessary in action or defence arising out of title to or rents of real property.

320. Seizin within two years necessary in actions for mining claims.

321. Such seizin, when necessary in action or defence arising out of title to or rents of mining claims.

322. Entry on real estate.

323. Possession, when presumed. Occupation deemed under legal title, unless adverse.

324. Occupation under written instrument or judgment, when deemed adverse.

325. What constitutes adverse possession under written instrument or judgment.

326. Premises actually occupied under claim of title deemed to be held adversely.

327. What constitutes adverse possession under claim of title not written.

SECTION 328. Relation of landlord and tenant as affecting adverse possession.

329. Right of possession not affected by descent cast.

330. Certain disabilities excluded from time to commence actions.

SEC. 315. The people of this state will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless—

When the people will not sue.

1. Such right or title shall have accrued within ten years before any action or other proceeding for the same is commenced; or,

2. The people, or those from whom they claim, shall have received the rents and profits of such real property, or of some part thereof, within the space of ten years.

Statutes of 1850, p. 343.

SEC. 316. No action can be brought for or in respect to real property by any person claiming under letters patent or grants from this state, unless the same might have been commenced by the people as herein specified, in case such patent had not been issued or grant made.

When action cannot be brought by grantee from the state.

Statutes of 1850, p. 343.

SEC. 317. When letters patent or grants of real property, issued or made by the people of this state, are declared void by the determination of a competent court, rendered upon an allegation of a fraudulent suggestion, or concealment, or forfeiture, or mistake, or ignorance of a material fact, or wrongful detaining, or defective title, in such case an action for the recovery of the property so conveyed may be brought either by the people of this state, or by any subsequent patentee or grantee of the same property, his heirs or assigns, within five years after such determination, but not after that period.

When actions by the people or their grantees are to be brought within five years.

Statutes of 1850, p. 343.

SEC. 318. No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the property in question, within five years before the commencement of the action.

Seizin within five years, when necessary in action for real property.

Statutes of 1863, p. 325.

Such seizin,
when neces-
sary in action
or defence
arising out
of title to or
rents of real
property.

SEC. 319. No cause of action, or defence to an action, arising out of the title to real property, or to rents or profits out of the same, can be effectual, unless it appear that the person prosecuting the action, or making the defence, or under whose title the action is prosecuted or the defence is made, or the ancestor, predecessor or grantor of such person, was seized or possessed of the premises in question within five years before the commencement of the act in respect to which such action is prosecuted or defence made.

Statutes of 1863, p. 325.

Seizin within
two years
necessary in
actions for
mining
claims.

SEC. 320. No action for the recovery of property in mining claims, or for the recovery of the possession thereof, can be maintained, unless it appears that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the property in question within two years before the commencement of this action.

Statutes of 1864, p. 91.

Such seizin,
when neces-
sary in action
or defence
arising out
of title to or
rents of min-
ing claims.

SEC. 321. No cause of action, or defence to an action, arising out of the title to property in mining claims, or to the rents or profits thereof, can be effectual, unless it appear that the person prosecuting the action or making the defence, or under whose title the action is prosecuted or the defence is made, or the ancestor, predecessor or grantor of such person, was seized or possessed of the property in question within two years before the commencement of the act in respect to which such action is prosecuted or defence made.

Statutes of 1864, p. 91.

Entry on
real estate.

SEC. 322. No entry upon real estate is deemed sufficient or valid as a claim, unless an action be commenced thereupon within one year after making such entry, and within five years from the time when the right to make it descended or accrued.

Statutes of 1863, p. 325.

Possession,
when pre-
sumed.

SEC. 323. In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property is presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person is

deemed to have been under and in subordination to the legal title, unless it appear that the property has been held and possessed adversely to such legal title, for five years before the commencement of the action.

Occupation deemed under legal title, unless adverse.

Statutes of 1850, p. 343.

SEC. 324. When it appears that the occupant, or those under whom he claims, entered into the possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument, as being a conveyance of the property in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the property included in such instrument, decree or judgment, or of some part of the property, under such claim, for five years, the property so included is deemed to have been held adversely, except that when it consists of a tract divided into lots, the possession of one lot is not deemed a possession of any other lot of the same tract.

Occupation under written instrument or judgment, when deemed adverse.

Statutes of 1850, p. 343.

SEC. 325. For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument, or a judgment or decree, land is deemed to have been possessed and occupied in the following cases :

What constitutes adverse possession under written instrument or judgment.

1. Where it has been usually cultivated or improved.
2. Where it has been protected by a substantial inclosure.
3. Where, although not inclosed, it has been used for the supply of fuel, or of fencing timber for the purposes of husbandry, or for pasturage, or for the ordinary use of the occupant.
4. Where a known farm or single lot has been partly improved, the portion of such farm or lot that may have been left not cleared, or not inclosed according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated.

Statutes of 1850, p. 343.

SEC. 326. Where it appears that there has been an actual continued occupation of land, under a claim of title,

Premises actually occupied under claim of title deemed to be held adversely.

exclusive of any other right, but not founded upon a written instrument, judgment or decree, the land so actually occupied, and no other, is deemed to have been held adversely.

Statutes of 1850, p. 344.

What constitutes adverse possession under claim of title not written.

SEC. 327. For the purpose of constituting an adverse possession, by a person claiming title not founded upon a written instrument, judgment or decree, land is deemed to have been possessed and occupied in the following cases only:

1. Where it has been protected by a substantial inclosure.
2. Where it has been usually cultivated or improved.

Statutes of 1850, p. 344.

Relation of landlord and tenant, as affecting adverse possession.

SEC. 328. When the relation of landlord and tenant has existed between any persons, the possession of the tenant is deemed the possession of the landlord until the expiration of five years from the termination of the tenancy, or where there has been no written lease, until the expiration of five years from the time of the last payment of rent, notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions cannot be made after the periods herein limited.

Statutes of 1850, p. 344.

Right of possession not affected by descent cast.

SEC. 329. The right of a person to the possession of real property is not impaired or affected by a descent cast in consequence of the death of a person in possession of such property.

Statutes of 1850, p. 344.

Certain disabilities excluded from time to commence actions.

SEC. 330. If a person entitled to commence an action for the recovery of real property, or for the recovery of the possession thereof, or to make any entry or defence founded on the title to real property, or to rents or services out of the same, be at the time such title first descends or accrues, either—

1. Within the age of majority; or,
2. Insane; or,
3. Imprisoned on a criminal charge, or in execution

upon conviction of a criminal offence, for a term less than for life; or,

4. A married woman, and her husband be a necessary party with her in commencing such action or making such entry or defence.

The time during which such disability continues is not deemed any portion of the time in this chapter limited for the commencement of such action or the making of such entry or defence, but such action may be commenced, or entry or defence made, within the period of five years after such disability shall cease, or after the death of the person entitled who shall die under such disability; but such action shall not be commenced, or entry or defence made, after that period.

Statutes of 1863, p. 325.

NOTE.—The preceding chapter embodies the provisions of existing statutes relative to the time of commencing actions for the recovery of real property. They have been carefully revised and placed in logical order, but no substantial changes have been made. Section 6 of the act of 1863 (Stat. 1863, p. 325) provides, among other things, that “any person claiming real property, or the possession thereof, or any right or interest therein, under title derived from the Spanish or Mexican governments, or the authorities thereof, which shall not have been finally confirmed by the government of the United States, or its legally constituted authorities, more than five years before the passage of this act, may have five years after the passage of this act in which to commence his action for the recovery of such real property, or the possession thereof, or any right or interest therein, or for rents or profits out of the same, or to make his defence to an action founded upon the title thereto; and *provided*, further, that nothing in this act contained shall be so construed as to extend or enlarge the time for commencing actions for the recovery of real estate or the possession thereof, under title derived from Spanish or Mexican governments, in a case where final confirmation has already been had, other than is now allowed under the act to which this act is amendatory.” As the time fixed in this statute has expired, and all rights that have accrued under it are preserved by the saving clause in the preliminary part of this code, it is thought unnecessary to insert any provisions excepting lands within those grants from the operation of the general rule relating to real actions.

Certain disabilities excluded from time to commence actions.

CHAPTER III.

THE TIME OF COMMENCING ACTIONS OTHER THAN FOR THE
RECOVERY OF REAL PROPERTY.

SECTION 335. Periods of limitation prescribed.

336. Within five years.

337. Within four years.

338. Within three years.

339. Within two years.

340. Within one year.

341. Within six months.

342. Same.

343. Actions for relief not hereinbefore provided for.

344. Where cause of action accrues on mutual account.

345. Actions by the people subject to the limitations of this chapter.

Periods of
limitation
prescribed.

SEC. 335. The periods prescribed in section three hundred and twelve for the commencement of actions other than for the recovery of real property, are as follows:

Within five
years.

SEC. 336. Within five years:

An action upon a judgment or decree of any court of the United States, or of any state within the United States.

Statutes of 1850, p. 343.

Within four
years.

SEC. 337. Within four years:

An action upon any contract, obligation or liability founded upon an instrument in writing.

Statutes of 1850, p. 343.

Within three
years.

SEC. 338. Within three years:

1. An action upon a liability created by statute, other than a penalty or forfeiture.

2. An action for trespass upon real property.

3. An action for taking, detaining or injuring any goods or chattels, including actions for the specific recovery of personal property.

4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.

Statutes of 1850, p. 343.

Sec. 339. Within two years :

Within two
years

1. An action upon a contract, obligation or liability, not founded upon an instrument of writing.

2. An action against a sheriff, coroner or constable, upon the liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution. But this subdivision does not apply to an action for an escape.

3. An action upon a judgment or upon a contract, obligation or liability for the payment of money or damages, founded upon an instrument in writing, executed out of this state.

4. An action to recover damages for the death of one caused by the wrongful act of another.

NOTE.—The first and second subdivisions are based upon acts of 1850 and 1859 (Stat. 1850, p. 343; 1859, p. 306). The third subdivision is a substitute for the numerous provisions relative to the time in which actions may be commenced upon liabilities incurred without the state, and founded upon judgments or written instruments. The fourth subdivision is based upon act of 1862 (Stat. 1862, p. 447).

Sec. 340. Within one year :

Within one
year.

1. An action upon a statute for a penalty or forfeiture, where the action is given to an individual, or to an individual and the state, except where the statute imposing it prescribes a different limitation.

2. An action upon a statute for a forfeiture or penalty to the people of this state.

3. An action for libel, slander, assault, battery or false imprisonment.

4. An action against a sheriff, or other officer, for the escape of a prisoner, arrested or imprisoned on civil process.

5. Upon a contract, obligation or liability for the payment of money incurred out of this state and not founded upon a written contract.

NOTE.—First four subdivisions are based upon statutes of 1850, p. 343. The fifth subdivision is new.

Sec. 341. Within six months: An action against an officer, or officer de facto, engaged in the collection of taxes :

Within six
months.

1. For money paid to any such officer under protest, or seized by such officer in his official capacity as a collector of taxes, and which, it is claimed, ought to be refunded.

2. To recover any goods, wares, merchandise or other property, seized by any such officer in his official capacity as tax collector, or to recover the price or value of any goods, wares, merchandise or other personal property so seized, or for damages for the seizure, detention, sale of or injury to any goods, wares, merchandise or other personal property seized, or for damages done to any person or property in making any such seizure.

Statutes of 1859, p. 306.

Same.

SEC. 342. Actions on claims against a county, which have been rejected by the board of supervisors, must be commenced within six months after the first rejection thereof by such board.

Actions for relief not hereinbefore provided for.

SEC. 343. An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued.

Statutes of 1850, p. 343.

Where cause of action accrues on mutual account.

SEC. 344. In an action brought to recover a balance due upon a mutual, open and current account, where there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item proved in the account on either side.

Statutes of 1850, p. 343.

Actions by the people subject to the limitations of this chapter.

SEC. 345. The limitations prescribed in this chapter apply to actions brought in the name of the state, or for the benefit of the state, in the same manner as to actions by private parties.

Statutes of 1850, p. 343.

CHAPTER IV.

GENERAL PROVISIONS AS TO THE TIME OF COMMENCING ACTIONS.

SECTION 350. When an action is commenced.

- 351. Exception, where defendant is out of the state.
- 352. Exception as to persons under disabilities.
- 353. Provision where person entitled dies before limitation expires.
- 354. In suits by aliens, time of war to be deducted.
- 355. Provision where judgment has been reversed.
- 356. Provision where action is stayed by injunction.
- 357. Disability must exist when right of action accrued.
- 358. When two or more disabilities exist, etc.
- 359. This title not applicable to actions against directors, etc.
Limitations in such cases prescribed.
- 360. Acknowledgment or new promise must be in writing.
- 361. Limitation laws of other states, effect of.
- 362. Existing causes of action not affected.

SEC. 350. An action is commenced, within the meaning of this title, when the complaint is filed.

When an action is commenced.

Statutes of 1850, p. 343.

SEC. 351. If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action.

Exception, where defendant is out of the state.

Statutes of 1850, p. 343.

SEC. 352. If a person entitled to bring an action, mentioned in chapter three of this title, be at the time the cause of action accrued, either—

Exception as to persons under disabilities.

1. Within the age of majority; or,
2. Insane; or,
3. Imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life; or,
4. A married woman, and her husband be a necessary party with her in commencing such action.

The time of such disability is not a part of the time limited for the commencement of the action.

Statutes of 1863, p. 325.

Provision
where per-
son entitled
dies before
limitation
expires.

SEC. 353. If a person entitled to bring an action die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives, after the expiration of that time, and within six months from his death. If a person against whom an action may be brought, die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his representatives after the expiration of that time, and within one year after the issuing of letters testamentary or of administration.

Statutes of 1850, p. 343.

In suits by
aliens, time
of war to be
deducted.

SEC. 354. When a person is an alien subject, or citizen of a country at war with the United States, the time of the continuance of the war is not part of the period limited for the commencement of the action.

Statutes of 1850, p. 343.

Provision
where judg-
ment has
been re-
versed.

SEC. 355. If an action is commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on appeal, the plaintiff, or if he die and the cause of action survive, his representatives, may commence a new action within one year after the reversal.

Statutes of 1850, p. 343.

Provision
where action
is stayed by
injunction.

SEC. 356. When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action.

Statutes of 1850, p. 343.

Disability
must exist
when right
of action
accrued.

SEC. 357. No person can avail himself of a disability, unless it existed when his right of action accrued.

Statutes of 1850, p. 343.

When two
or more
disabilities
exist, etc.

SEC. 358. When two or more disabilities co-exist at the time the right of action accrues, the limitation does not attach until they are removed.

Statutes of 1850, p. 343.

SEC. 359. This title does not affect actions against

directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created.

This title not applicable to actions against directors, etc. Limitations in such cases prescribed.

Statutes of 1850, p. 843.

SEC. 360. No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby.

Acknowledgment or new promise must be in writing.

Statutes of 1850, p. 343.

SEC. 361. When a cause of action has arisen in another state, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of a citizen thereof, who has held the cause of action from the time it accrued.

Limitation laws of other states, effect of.

Statutes of 1852, p. 161.

SEC. 362. This title does not extend to actions already commenced, nor to cases where the time prescribed in any existing statute for acquiring a right or barring a remedy has fully run, but the laws now in force are applicable to such actions and cases, and are repealed subject to the provisions of this section.

Existing causes of action not affected.

TITLE III.

OF THE PARTIES TO CIVIL ACTIONS.

SECTION 367. Action to be in name of party in interest.

368. Assignment of thing in action not to prejudice defence.

369. Executor, trustee, etc., may sue without joining the persons beneficially interested.

370. When a married woman is a party—actions by and against.

371. Wife may defend, when.

372. Infant to appear by guardian.

373. Guardian, how appointed.

SECTION 374. Unmarried female may sue for her own seduction.

375. Father, etc., may sue, for seduction of daughter, etc.

376. Father, etc., may sue, for injury or death of child.

377. When representatives may sue for death of one caused by the wrongful act of another.

378. Who may be joined as plaintiffs.

379. Who may be joined as defendants.

380. Parties in interest, when to be joined. When one or more may sue or defend for the whole.

381. Plaintiff may sue in one action the different parties to commercial paper.

382. Tenants in common, etc., may sever in bringing or defending actions.

383. Action, when not to abate by death, marriage or other disability. Proceedings in such case.

384. Another person may be substituted for the defendant.

385. Intervention, when it takes place and how made.

386. Associates may be sued by name of association.

387. Court, when to decide controversy or to order other parties to be brought in.

Action to be
in name of
party in
interest.

SEC. 367. (§ 4) Every action must be prosecuted in the name of the real party in interest, except as provided in section three hundred and sixty-nine.

Statutes of 1864, p. 29.

Assignment
of thing in
action not to
prejudice
defence.

SEC. 368. (§ 5.) In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off or other defence existing at the time of, or before, notice of the assignment; but this section does not apply to a negotiable promissory note or bill of exchange, transferred in good faith and upon good consideration, before maturity.

Executor,
trustee, etc.,
may sue
without
joining the
persons
beneficially
interested.

SEC. 369. (§ 6) An executor or administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the persons for whose benefit the action is prosecuted. A person with whom, or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section.

Statutes of 1854, p. 84.

When a mar-
ried woman
is a party—
actions by
and against.

SEC. 370. (§ 7.) When a married woman is a party, her husband must be joined with her, except—

1. When the action concerns her separate property or her right or claim to the homestead property, she may sue alone.

2. When the action is between herself and her husband she may sue or be sued alone.

3. When she is living separate and apart from her husband, she may sue or be sued alone.

Statutes of 1868, p. 550.

NOTE.—The third subdivision is taken from the statutes of 1870, p. 226.

SEC. 371. (§ 8.) If a husband and wife be sued together, the wife may defend for her own right, and if the husband neglect to defend, she may defend for his right also.

Wife may defend, when

NOTE.—The words "and if the husband neglect," etc., are added to the original provisions of section 8 of the practice act.

SEC. 372. (§ 9.) When an infant is a party he must appear by guardian, who may be appointed by the court in which the action is prosecuted, or by a judge thereof, or a county judge.

Infant to appear by guardian.

SEC. 373. (§ 10.) The guardian must be appointed as follows :

Guardian, how appointed.

1. When the infant is plaintiff: upon the application of the infant, if he be of the age of fourteen years; or if under that age, upon the application of a relative or friend of the infant.

2. When the infant is defendant: upon the application of the infant, if he be of the age of fourteen years and apply within ten days after the service of the summons; if he be under the age of fourteen, or neglect so to apply, then upon the application of any other party to the action, or of a relative or friend of the infant.

SEC. 374. An unmarried female may prosecute, as plaintiff, an action for her own seduction, and may recover therein such damages, pecuniary or exemplary, as are assessed in her favor.

Unmarried female may sue, for her own seduction.

NOTE.—This, and the succeeding section, are new—introduced by the commissioners. At present, the action must be in the name of the parent, or one who stands in that relation, and is supported by the fiction that he has suffered pecuniary injury by loss of service, etc. The object of these sections is to provide a remedy in favor of the party injured, and to make the law, in this respect,

harmonious with the declaration of the code, "that all actions must be prosecuted in the name of the real party," etc.

Father, etc.,
may sue for
seduction of
daughter,
etc.
N. S.

SEC. 375. A father, or in case of his death or desertion of his family, the mother, may prosecute as plaintiff for the seduction of the daughter, and the guardian for the seduction of the ward, though the daughter or ward be not living with or in the service of the plaintiff at the time of the seduction or afterwards, and there be no loss of service.

Father, etc.,
may sue for
injury or
death of
child.

SEC. 376. (§11.) A father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a child, and a guardian for the injury or death of his ward.

When repre-
sentatives
may sue for
death of one
caused by
the wrong-
ful act of
another.

SEC. 377. When the death of a person is caused by the wrongful act or neglect of another, his representatives may maintain an action for damages against the person causing the death, or when the death of a person is caused by an injury received in falling through any opening or defective place in any sidewalk, street, alley, square or wharf, his personal representatives may maintain an action for damages against the person whose duty it was, at the time of the injury, to have kept in repair such sidewalk or other place. In every such action, the jury may give such damages, pecuniary or exemplary, as, under all the circumstances of the case, may to them seem just.

NOTE.—The preceding section is intended as a substitute for "an act requiring compensation for causing death by wrongful act, neglect or default." (Stat. 1862, p. 447.) The portion of that act relating to the time in which the action must be commenced is inserted in chapter 3 of the title relating to the time in which civil actions must be commenced.

Who may
be joined as
plaintiffs.

SEC. 378. (§12.) All persons having an interest in the subject of the action and in obtaining the relief demanded, may be joined as plaintiffs, except when otherwise provided in this title.

Who may
be joined as
defendants.

SEC. 379. (§13.) Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved

therein. And in an action to determine the title or right of possession to real property which, at the time of the commencement of the action, is in the possession of a tenant, the landlord may be joined as a party defendant.

NOTE.—The last clause is added to avoid the rule laid down in *Dimick vs. Deringer* (32 Cal. 488) that “when the premises are in possession of a tenant, the tenant is, and the landlord is not, a proper party defendant.” All who have given the subject any consideration, will concede that the plaintiff ought to have the right to make the landlord a party to the action, and to bind him by the judgment, otherwise he would in every such case be driven to two actions to determine what could as well be settled in one.

SEC. 380. (§ 14.) Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

Parties in interest, when to be joined.

When one or more may sue or defend for the whole

SEC. 381. (§ 15.) Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff.

Plaintiff may sue in one action the different parties to commercial paper.

SEC. 382. All persons holding as tenants in common, joint tenants or coparceners, or any number less than all, may jointly or severally commence or defend any civil action or proceeding for the enforcement or protection of the rights of such party.

Tenants in common, etc., may sever in bringing or defending actions.

Statutes of 1867, p. 62.

SEC. 383. (§ 16.) An action or proceeding does not abate by the death, marriage or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death, marriage or other disability of a party, the court, on motion, may allow the action or proceeding to be continued

Action, when not to abate by death, marriage or other disability. Proceedings in such case.

by or against his representative or successor in interest. In case of any other transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made, to be substituted in the action or proceeding.

Another person may be substituted for the defendant.

SEC. 384. (§ 658.) A defendant against whom an action is pending upon a contract, or for specific personal property, may, at any time before answer, upon affidavit that a person not a party to the action makes against him, and without any collusion with him, a demand upon the same contract, or for the same property, upon notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount claimed on the contract, or delivering the property, or its value, to such person as the court may direct; and the court may, in its discretion, make the order.

NOTE.—This is section 658 of the practice act, taken from its place and inserted here because it relates to parties to actions.

Intervention, when it takes place, and how made.

SEC. 385. (§§ 659, 660, 661.) Any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, and is made by complaint, setting forth the grounds upon which the intervention rests, filed by leave of the court and served upon the parties to the action or proceeding, who may answer it as if it were an original complaint.

NOTE.—This section is based upon sections 659, 660 and 661 of the practice act, and is placed in this part of the code for the reason that it relates to parties.

SEC. 386. (§ 656.) When two or more persons, associated

in any business, transact such business under a common name, whether it comprise the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, in the same manner as if all had been named defendants and had been sued upon their joint liability.

Associates
may be sued
by name of
association.

NOTE.—This is substantially section 656 of the practice act, inserted here as the appropriate place for it.

SEC. 387. (§ 17.) The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in. And when, in an action for the recovery of real or personal property, a person not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in, by the proper amendment.

Court, when
to decide
controversy
or to order
other parties
to be
brought in.

NOTE.—The last clause is added to the original section.

TITLE IV.

OF THE PLACE OF TRIAL OF CIVIL ACTIONS.

SECTION 392. Certain actions to be tried where the subject or some part thereof is situated.

393. Other actions, where the cause or some part thereof arose.

394. Place of trial of actions against counties.

395. Other actions according to the residence of the parties.

396. Action may be tried in any county, unless the defendant demand a trial in the proper county.

397. Place of trial may be changed in certain cases.

398. When judge is disqualified, cause to be transferred.

399. Papers to be transmitted. Costs, etc. Jurisdiction, etc.

400. Proceedings after judgment in certain cases transferred.

SEC. 392. (§ 18.) Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of

Certain actions to be
tried where
the subject
or some part
thereof is
situated.

the court to change the place of trial, as provided in this code :

1. For the recovery of real property, or of an estate or interest therein, or for the determination, in any form, of such right or interest, and for injuries to real property.

2. For the partition of real property.

3. For the foreclosure of a mortgage of real property.

Where the real property is situated partly in one county and partly in another, the plaintiff may select either of the counties, and the county so selected is the proper county for the trial of such action.

Other actions, where the cause or some part thereof arose.

SEC. 393. (§ 19.) Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the like power of the court to change the place of trial :

1. For the recovery of a penalty or forfeiture imposed by statute ; except, that when it is imposed for an offence committed on a lake, river or other stream of water, situated in two or more counties, the action may be brought in any county bordering on such lake, river or stream, and opposite to the place where the offence was committed.

2. Against a public officer or person especially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who, by his command or in his aid, does anything touching the duties of such officer.

Place of trial of actions against counties.

SEC. 394. Actions against counties may be commenced and tried in any county in the judicial district in which such county is situated, unless such actions are between counties, in which case they may be commenced and tried in any county not a party thereto.

Statutes of 1854, p. 194.

Other actions according to the residence of the parties.

SEC. 395. (§ 20.) In all other cases, the action must be tried in the county in which the defendants, or some of them, reside at the commencement of the action ; or, if none of the defendants reside in the state, or, if residing in this state, the county in which they reside is unknown to the plaintiff, the same may be tried in any county which the plaintiff may designate in his complaint ; and if the defendant is about to depart from the state, such action may be tried in any county where either of the

parties reside or service is had; subject, however, to the power of the court to change the place of trial as provided in this code.

SEC. 396. If the county in which the action is commenced is not the proper county for the trial thereof, the action may, notwithstanding, be tried therein, unless the defendant, before the time for answering has expired, demand in writing that the trial be had in the proper county, and the place of trial be thereupon changed by consent of parties, or by order of the court, as provided in the next section.

Action may be tried in any county, unless the defendant demand a trial in the proper county.
N. S.

SEC. 397. (§ 21.) The court may, on motion, change the place of trial in the following cases:

Place of trial may be changed in certain cases.

1. When the county designated in the complaint is not the proper county.
2. When there is reason to believe that an impartial trial cannot be had therein.
3. When the convenience of witnesses and the ends of justice would be promoted by the change.
4. When from any cause the judge is disqualified from acting.

SEC. 398. If an action or proceeding is commenced or pending in a court and the judge or justice thereof is disqualified from acting as such, or if for any cause the court orders the place of trial to be changed, it must be transferred for trial to a court the parties may agree upon by stipulation in writing, or made in open court and entered in the minutes; or, if they do not so agree, then to the nearest court where the like objection or cause for making the order does not exist, as follows:

When judge is disqualified, cause to be transferred.

1. If in the district court, to another district court.
2. If in a county court, to some other county court.
3. If in the probate court, to some other probate court.
4. If in a justice's court, to another justice's court in the same county.
5. If in a police court, to some other police court.

SEC. 399. When an order is made transferring an action or proceeding for trial, the clerk of the court, or justice of the peace, must transmit the pleadings and

Papers to be transmitted.

Costs, etc.

papers therein to the clerk or justice of the court to which it has been transferred. If the transfer is made on the ground that a judge or justice is disqualified from acting, the costs and fees thereof, and of re-entering and filing the pleadings and papers anew, are to abide the event of the action or proceeding; in other cases, they are to be paid by the party at whose instance the order is made; and the court to which an action or proceeding is transferred has and exercises over the same the like jurisdiction as if it had been originally commenced therein, and may, by order or execution, enforce the judgment.

Jurisdiction,
etc.Proceedings
after judgment in certain cases transferred.

SEC. 400. In an action or proceeding transferred from a probate court, or brought to recover the possession of lands or tenements, after final judgment therein, the clerk of the court in which it is heard must certify under his seal of office, and transmit to the court from whence it is transferred, a full transcript of the proceedings and judgment. The clerk receiving such transcript must docket and record the judgment in the records of his court, briefly designating it as a judgment transferred from — court (naming the proper court).

TITLE V.

OF THE MANNER OF COMMENCING CIVIL ACTIONS.

SECTION 405. Actions, how commenced.

- 406. Complaint, how indorsed. When summons may be issued, and how waived.
- 407. Summons, how issued, directed, and what to contain.
- 408. Notice of the pendency of an action affecting the title to real property.
- 409. Summons, how served and returned.
- 410. Summons, how served.
- 411. Publication when defendant is absent from the state, concealed, or a foreign corporation having no agent, etc.
- 412. Manner of publication and appointment of attorney.
- 413. Proceedings where there are several defendants and part only are served.
- 414. Proof of service, how made.
- 415. When jurisdiction of action acquired.

Actions, how
commenced.

SEC. 405. (§ 22.) Civil actions in the courts of this

state are commenced by filing a complaint and the issuing of summons thereon.

Sec. 406. (§ 23.) The clerk must indorse on the complaint the day, month and year that it is filed, and at any time within one year thereafter the plaintiff may have summons issued. But at any time after the complaint is filed the defendant may, in writing, or by appearing and answering or demurring, waive the issuing of summons.

Complaint,
how in-
dorsed.

When sum-
mons may be
issued, and
how waived.

Sec. 407. (§§ 23, 24, 25, 26.) The summons must be directed to the defendant, signed by the clerk and issued under the seal of the court, and must contain—

Summons,
how issued,
directed, and
what to
contain.

1. The names of the parties to the action, the court in which it is brought and the county in which the complaint is filed.

2. The cause and general nature of the action.

3. A direction that the defendant appear and answer the complaint within ten days, if the summons is served within the county in which the action is brought; within twenty days, if served out of the county but in the district in which the action is brought, and within forty days, if served elsewhere.

4. In an action arising on contract, for the recovery of money or damages only, a notice that unless the defendant so appears and answers, the plaintiff will take judgment for the sum demanded in the complaint (stating it).

5. In other actions, a notice that unless defendant so appears and answers, the plaintiff will apply to the court for the relief demanded in the complaint.

The name of the plaintiff's attorney must be indorsed on the summons.

NOTE.—The preceding section embodies in a condensed form the substance of sections 24, 25 and 26, and the last clause of section 23, of the practice act. These matters are placed in one section for the sake of brevity and convenience.

Sec. 408. (§ 27) In an action affecting the title to real property, the plaintiff, at the time of filing the complaint, and the defendant, at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterwards, may file with the recorder of the county in which the property is situated, a notice of the pendency

Notice of the
pendency
of an action
affecting the
title to real
property.

of the action, containing the names of the parties to, and the object of, the action or defence, and a description of the property in that county affected thereby. From the time of filing, only, is the pendency of the action constructive notice to a purchaser or encumbrancer of the property affected thereby.

Summons,
how served
and returned

SEC. 409. (§ 28.) The summons may be served by the sheriff of the county where the defendant is found, or by any other person not a party to the action. A copy of the complaint must be served with the summons, unless there is more than one defendant residing in the same county, in which case a copy of the complaint must be served upon one of them. When the summons is served by the sheriff, it must be returned, with his certificate of its service, and of the service of a copy of the complaint, to the office of the clerk from which it issued. When it is served by any other person, it must be returned to the same place, with an affidavit of such person of its service, and of the service of a copy of the complaint.

Summons,
how served.

SEC. 410. (§ 29.) The summons must be served by delivering a copy thereof, as follows :

1. If the suit is against a corporation : to the president, or other head of the corporation, secretary, cashier or managing agent thereof.

2. If the suit is against a foreign corporation, or a non-resident joint stock company or association doing business and having a managing or business agent, cashier or secretary within this state : to such agent, cashier or secretary.

3. If against a minor under the age of fourteen years : to such minor personally, and also to his father, mother or guardian ; or if there be none within the state, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed.

4. If against a person judicially declared to be of unsound mind or incapable of conducting his own affairs, and for whom a guardian has been appointed : to such guardian.

5. If against a county, city or town : to the president of the board of supervisors, president of the council or trustees, or other head of the legislative department thereof.

6. In all other cases : to the defendant personally.

SEC. 411. (§ 30.) Where the person on whom the service is to be made resides out of the state, or has departed from the state, or cannot after due diligence be found within the state, or conceals himself to avoid the service of summons, or is a foreign corporation having no managing or business agent, cashier or secretary within the state, and the fact appears by affidavit to the satisfaction of the court or a judge thereof, or a county judge, and it in like manner appears that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action, such court or judge may make an order that the service be made by the publication of the summons.

Publication when defendant is absent from the state, concealed, or a foreign corporation having no agent, etc.

SEC. 412. (§ 31.) The order must direct the publication to be made in a newspaper to be designated, as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at least once a week; but publication against a defendant residing out of the state, or absent therefrom, must not be less than two months. In case of publication where the residence of a non-resident or absent defendant is known, the court or judge must direct a copy of the summons and complaint to be forthwith deposited in the post-office, directed to the person to be served, at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint, out of the state, is equivalent to publication and deposit in the post-office. In either case, the service of the summons is complete at the expiration of the time prescribed by the order for publication. In actions upon contracts for the direct payment of money, the court in its discretion may, instead of ordering publication, or may, after publication, appoint an attorney to appear for the non-resident, absent or concealed defendant, and conduct the proceedings on his part.

Manner of publication and appointment of attorney.

SEC. 413. (§ 32.) Where the action is against two or more defendants, and the summons is served on one or more but not on all of them, the plaintiff may proceed as follows :

Proceedings where there are several defendants and part only are served.

1. If the action be against the defendants jointly in-

debted upon a contract, he may proceed against the defendant served, unless the court otherwise direct; and if he recover judgment, it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all, and the separate property of the defendant served; or,

2. If the action be against defendants severally liable, he may proceed against the defendants served, in the same manner as if they were the only defendants.

Proof of service, how made.

SEC. 414. (§§ 33, 34.) Proof of the service of summons and complaint must be as follows:

1. If served by the sheriff, his certificate thereof
2. If by any other person, his affidavit thereof; or,
3. In case of publication, the affidavit of the printer, or his foreman or principal clerk, showing the same; and an affidavit of a deposit of a copy of the summons in the post-office, if the same has been deposited; or,
4. The written admission of the defendant.

In case of service otherwise than by publication, the certificate or affidavit must state the time and place of service.

When jurisdiction of action acquired.

SEC. 415. (§ 35.) From the time of the service of the summons and copy of complaint in a civil action the court is deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings. The voluntary appearance of a defendant is equivalent to personal service of the summons upon him.

TITLE VI.

OF THE PLEADINGS IN CIVIL ACTIONS.

CHAPTER I. *The pleadings in general.*

- II. *The complaint.*
- III. *Demurrer to the complaint.*
- IV. *The answer.*
- V. *Demurrer to answer.*
- VI. *Verification of pleadings.*
- VII. *General rules of pleading.*
- VIII. *Variance—mistakes in pleadings and amendments.*

CHAPTER I.

THE PLEADINGS IN GENERAL.

SECTION 420. Definition of pleadings.

421. This code prescribes the form and rules of pleadings.

422. What pleadings are allowed.

SEC. 420. (§ 36.) The pleadings are the formal allegations by the parties of their respective claims and defences, for the judgment of the court.

Definition of pleadings.

SEC. 421. (§ 37.) The forms of pleading in civil actions, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed in this code.

This code prescribes the form and rules of pleadings.

SEC. 422. (§ 38.) The only pleadings allowed on the part of the plaintiff are—

What pleadings are allowed.

1. The complaint.

2. The demurrer to the answer.

And on the part of the defendant—

1. The demurrer.

2. The answer.

NOTE.—We have been urged to restore the “reply,” and the arguments in favor of its restoration are convincing. Were we making the law, instead of drafting a bill to be passed upon by the law-making power, we would feel no hesitation whatever as to our course. The “reply” once formed a part of our system of pleading, and after a short trial it was abandoned. Were we to restore it, we would be met with this fact as an objection. After careful consideration, we have determined not to move in the premises.

The “cross complaint” has been omitted, for we think it may be safely said, that no member of the profession has ever found any use for it. Nothing can be brought into a case by “cross complaint” that could not, under our system, be brought in by answer.

CHAPTER II.

THE COMPLAINT.

SECTION 425. Complaint, first pleading.

426. Complaint, what to contain.

427. What causes of action may be joined.

Complaint,
first plead-
ing.

SEC. 425. The first pleading on the part of the plaintiff is the complaint.

Complaint,
what to
contain.

SEC. 426. (§ 39.) The complaint must contain—

1. The title of the action, the name of the court and county in which the action is brought, and the name of the parties to the action.

2. A statement of the facts constituting the cause of action, in ordinary and concise language.

3. A demand of the relief which the plaintiff claims. If the recovery of money or damages be demanded, the amount thereof must be stated.

What causes
of action may
be joined.

SEC. 427. (§ 64.) The plaintiff may unite several causes of action in the same complaint where they all arise out of—

1. Contracts express or implied.

2. Claims to recover specific real property, with or without damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same.

3. Claims to recover specific personal property, with or without damages for the withholding thereof.

4. Claims against a trustee by virtue of a contract or by operation of law.

5. Injuries to character.

6. Injuries to person.

7. Injuries to property.

The causes of action so united must all belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated; but an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to character or to the person.

CHAPTER III.

DEMURRER TO THE COMPLAINT.

SECTION 430. When defendant may demur.

431. Demurrer must specify, etc. May be taken to part. May answer and demur at same time.

SECTION 432. What proceedings are to be had when complaint is amended.

433. Objection not appearing on complaint, may be taken by answer.

434. Objections, when deemed waived.

SEC. 430. (§ 40.) The defendant may demur to the complaint within the time required in the summons to answer, when it appears upon the face thereof, either—

When defendant may demur.

1. That the court has no jurisdiction of the person of the defendant, or the subject of the action; or,

2. That the plaintiff has not legal capacity to sue; or,

3. That there is another action pending between the same parties for the same cause; or,

4 That there is a defect or misjoinder of parties plaintiff or defendant; or,

5. That several causes of action have been improperly united; or,

6. That the complaint does not state facts sufficient to constitute a cause of action; or,

7. That the complaint is ambiguous, unintelligible or uncertain.

SEC. 431. (§§ 41, 42) The demurrer must distinctly specify the grounds upon which any of the objections to the complaint are taken. Unless it do so, it may be disregarded. It may be taken to the whole complaint or to any of the causes of action stated therein, or the defendant may demur and answer at the same time.

Demurrer must specify, etc.

May be taken to part
May answer and demur at same time

SEC. 432. (§ 43.) If the complaint is amended, a copy of the amendments must be filed, or the court may, in its discretion, require the complaint, as amended, to be filed, and a copy of the amendments to be served upon the defendants affected thereby. The defendant must answer the complaint, as amended, within such time as the court may direct, and judgment by default may be entered upon failure to answer, as in other cases.

What proceedings are to be had when complaint is amended.

SEC. 433. (§ 44.) When any of the matters enumerated in section four hundred and thirty do not appear upon the face of the complaint, the objection may be taken by answer.

Objection not appearing on complaint, may be taken by answer.

SEC. 434. (§ 45.) If no objection be taken, either by demurrer or answer, the defendant must be deemed to

Objections, when deemed waived

have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.

CHAPTER IV.

THE ANSWER.

SECTION 437. Answer, what to contain.

438. When counter claim may be set up.

439. Counter claim not barred by death or assignment.

440. Answer may contain several grounds of defence. Defendant may answer part and demur to part of complaint.

Answer,
what to
contain.

SEC. 437. The answer of the defendant shall contain—

1. If the complaint be verified, a specific denial to each allegation of the complaint controverted by the defendant, or a denial thereof according to his information and belief; if the complaint be not verified, then a general denial to each of said allegations; but a general denial only puts in issue the material and express allegations of the complaint.

2. A statement of any new matter in avoidance, or constituting a defence or counter claim.

When coun-
ter claim
may be set
up

SEC. 438. (§ 47.) The counter claim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

1. A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

2. In an action arising upon contract; any other cause of action arising also upon contract and existing at the commencement of the action.

Counter
claim not
barred by
death or
assignment.

SEC. 439. (§ 48.) When cross demands have existed between persons, under such circumstances, that if one had brought an action against the other, a counter claim could have been set up, neither can be deprived of the benefit thereof by the assignment or death of the other;

but the two demands must be deemed compensated, so far as they equal each other.

SEC. 440. (§ 49.) The defendant may set forth by answer as many defences and counter claims as he may have. They must be separately stated, and the several defences must refer to the causes of action which they are intended to answer, in a manner by which they may be intelligibly distinguished. The defendant may also answer one or more of the several causes of action stated in the complaint and demur to the residue.

Answer may contain several grounds of defence.

Defendant may answer part and demur to part of complaint.

CHAPTER V.

DEMURRER TO ANSWER.

SECTION 443. When plaintiff may demur to answer.

SEC. 443. (§ 50.) When the answer contains new matter in avoidance, or constituting a defence or a counter claim, the plaintiff may, within the number of days in which the defendant is by the summons required to answer, to be computed from the time of the service of a copy of such answer, demur to the same for insufficiency, stating therein the grounds of such demurrer.

When plaintiff may demur to answer.

CHAPTER VI.

VERIFICATION OF PLEADINGS.

SECTION 446. Verification of pleadings.

447. Copy of written instrument contained in complaint admitted, unless answer is verified.

448. When defence is founded on written instrument set out in answer, its execution admitted, unless denied by plaintiff, under oath.

449. Exceptions to rules prescribed by two preceding sections.

SEC. 446. (§§ 51, 52, 55.) Every pleading must be subscribed by the party or his attorney; and when the complaint is verified, or when the state, or any officer of the

Verification of pleadings.

state, in his official capacity, is plaintiff, the answer must be verified, unless an admission of the truth of the complaint might subject the party to a criminal prosecution or unless an officer of the state, in his official capacity, is defendant. In all cases of a verification of a pleading, the affidavit of the party must state that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true; and where a pleading is verified, it must be by the affidavit of a party, unless the parties are absent from the county where the attorney resides, or from some cause unable to verify it, or the facts are within the knowledge of his attorney or other person verifying the same. When the pleading is verified by the attorney, or any other person except one of the parties, he must set forth in the affidavit the reasons why it is not made by one of the parties. When a corporation is a party, the verification may be made by any officer thereof.

NOTE.—We have carried into the preceding section the provisions of section 2 of an act relating to pleadings in behalf of the state or officers thereof. (Stat. 1864, p. 261.)

Copy of written instrument contained in complaint admitted, unless answer is verified

SEC. 447. (§ 53.) When an action is brought upon a written instrument, and the complaint contains a copy of such instrument, or a copy is annexed thereto, the genuineness and due execution of such instrument is deemed admitted, unless the answer denying the same be verified.

When defence is founded on written instrument set out in answer, its execution admitted, unless denied by plaintiff, under oath.

SEC. 448. (§ 54.) When the defence to an action is founded on a written instrument, and a copy thereof is contained in the answer, or is annexed thereto, the genuineness and due execution of such instrument is deemed admitted, unless the plaintiff file with the clerk, five days before the commencement of the term at which the action is to be tried, an affidavit denying the same.

Exceptions to rules prescribed by two preceding sections.

SEC. 449. (§ 54.) But the execution of the instruments mentioned in the two preceding sections, is not deemed admitted by a failure to deny the same under oath, if the party desiring to controvert the same is, upon demand, refused an inspection of the original.

CHAPTER VII.

GENERAL RULES OF PLEADING.

SECTION 452. Pleadings to be liberally construed.

- 453. Sham and irrelevant answers, etc., may be stricken out.
- 454. How to state an account in pleadings.
- 455. Description of real property in a pleading.
- 456. Judgments, how pleaded.
- 457. Conditions precedent, how to be pleaded.
- 458. Statute of limitations, how pleaded.
- 459. Private statutes, how pleaded.
- 460. Libel and slander, how stated in complaint. Not necessary to allege or prove special damages.
- 461. Answer in such cases.
- 462. Allegation not denied, when to be deemed true. When to be deemed controverted.
- 463. A material allegation defined.
- 464. Supplemental complaint and answer.

SEC. 452. (§ 70.) In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties.

Pleadings to be liberally construed.

SEC. 453. (§§ 50, 57.) Sham and irrelevant answers, and irrelevant and redundant matter inserted in a pleading, may be stricken out, upon such terms as the court may, in its discretion, impose.

Sham and irrelevant answers, etc., may be stricken out.

SEC. 454. (§ 56.) It is not necessary for a party to set forth in a pleading the items of an account therein alleged, but he must deliver to the adverse party, within five days after a demand thereof in writing, a copy of the account, or be precluded from giving evidence thereof. The court, or a judge thereof, or a county judge, may order a further account, when the one delivered is too general, or is defective in any particular.

How to state an account in pleadings.

SEC. 455. (§ 58.) In an action for the recovery of real property it must be described in the complaint by metes and bounds, and with such certainty as to enable an officer upon execution to identify it.

Description of real property in a pleading.

SEC. 456. (§ 59.) In pleading a judgment, or other determination of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdic-

Judgments, how pleaded.

tion, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading must establish on the trial the facts conferring jurisdiction.

Conditions precedent, how to be pleaded.

SEC. 457. (§ 60.) In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing such performance.

Statute of limitations, how pleaded. N. S.

SEC. 458. In pleading the statute of limitations it is not necessary to state the facts showing the defence, but it may be stated generally that the cause of action is barred by the provisions of section — (giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the code of civil procedure; and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing that the cause of action is so barred.

NOTE.—The commissioners have introduced this section, believing that a pleading under it will be more concise, and at the same time will afford to the opposite party all the information necessary to enable him to meet the defence made. If we are correct, the utility of the section is manifest. For instance, if the action be for the recovery of the possession of a mining claim, instead of the lengthy averments now required, the plea will be as follows: "Defendant avers that the cause of action is barred by the provisions of section 320 of the code of civil procedure."

Private statutes, how pleaded.

SEC. 459. (§ 61.) In pleading a private statute, or a right derived therefrom, it is sufficient to refer to such statute by its title and the day of its passage.

Libel and slander, how stated in complaint.

SEC. 460. (§ 62.) In an action for libel or slander, it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it is sufficient to state, generally, that the same was published or spoken concerning the plaintiff; and if such allegation be controverted, the plaintiff must establish, on the trial, that it was so published or spoken.

Nor in either action is it necessary either to allege or prove any special damage, but the plaintiff may recover such damages, pecuniary or exemplary, as may be assessed in his favor.

Not necessary to allege or prove special damages.

NOTE.—The last clause we have added to the section. As the law now stands, the reputation of the purest woman in the land may be assailed, and the vilest terms applied to her, yet, unless she sustains a pecuniary loss, she has no remedy in an action for slander. If laws are intended to protect reputation, then certainly this addition is advisable.

SEC. 461. (§ 63.) In the actions mentioned in the last section, the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances.

Answer in such cases.

SEC. 462. (§ 65.) Every material allegation of the complaint, not controverted by the answer, must, for the purposes of the action, be taken as true; the statement of any new matter in the answer, in avoidance or constituting a defence or counter claim, must, on the trial, be deemed controverted by the opposite party.

Allegation not denied, when to be deemed true. When to be deemed controverted.

SEC. 463. (§ 66.) A material allegation in a pleading is one essential to the claim or defence, and which could not be stricken from the pleading without leaving it insufficient.

A material allegation defined.

SEC. 464. (§ 67.) The plaintiff and defendant, respectively, may be allowed, on motion, to make a supplemental complaint or answer, alleging facts material to the case occurring after the former complaint or answer.

Supplemental complaint and answer.

CHAPTER VIII.

VARIANCE—MISTAKES IN PLEADINGS AND AMENDMENTS.

SECTION 469. Material variances, how provided for.

470. Immaterial variance, how provided for.

471. What not to be deemed a variance.

472. Amendments of course, and effect of demurrer.

SECTION 473. Amendments by the court. Enlarging time to plead and relieving from judgments, etc.

474. Suing a party by a fictitious name, when allowed.

475. No error or defect to be regarded unless it affects substantial rights.

Material
variances,
how pro-
vided for.

SEC. 469. (§ 579.) No variance between the allegation in a pleading and the proof is to be deemed material, unless it have actually misled the adverse party to his prejudice, in maintaining his action or defence upon the merits. Whenever it is alleged that a party has been so misled, that fact must be proved to the satisfaction of the court, and thereupon the court may order the pleading to be amended, upon such terms as may be just

NOTE.—The latter part of this section has been added by the commissioners. It accords with the construction placed by the courts upon the section as it originally stood. (*Catlin vs. Gunter*, 10 How. Pr. R. 321; *Cathcal vs. Talmadge*, 1 E. D. Smith, 575. And see, also, *Began vs. O'Reilly*, 32 Cal. 11.)

Immaterial
variance,
how pro-
vided for.
N. S.

SEC. 470. Where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.

What not to
be deemed
a variance.
N. S.

SEC. 471. Where, however, the allegation of the claim or defence to which the proof is directed, is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance, within the last two sections, but a failure of proof.

Amend-
ments of
course, and
effect of
demurrer.

SEC. 472. (§ 67) Any pleading may be amended once by the party of course, and without costs, at any time before answer or demurrer filed, or after demurrer and before the trial of the issue of law thereon, by filing the same as amended and serving a copy on the adverse party, who may have ten days thereafter in which to answer or demur to the amended pleading. A demurrer is not waived by filing an answer at the same time; and when the demurrer to a complaint is overruled and there is no answer filed, the court must allow an answer to be filed. If a demurrer to the answer is overruled, the facts alleged in the answer must be considered as denied, to the extent mentioned in section four hundred and sixty-two.

NOTE.—The original section has been changed so as to permit amendments of course before answer or demurrer. The last clause of the original section is in substance embodied in the last section of the preceding chapter.

SEC. 473. (§ 68.) The court may, in furtherance of justice, and on such terms as may be proper, amend any pleading or proceedings by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, upon affidavit showing good cause therefor, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars, and may, upon like terms, allow an answer to be made after the time limited by this code; and may, upon such terms as may be just, and upon payment of costs, relieve a party or his legal representatives from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect; and when, for any cause satisfactory to the court, or the judge at chambers, the party aggrieved has been unable to apply for the relief sought during the term at which such judgment, order or proceeding complained of was taken, the court, or the judge at chambers, in vacation, may grant the relief upon application made within a reasonable time, not exceeding five months after the adjournment of the term. When, from any cause, the summons and a copy of the complaint in an action have not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representatives, at any time within six months after the rendition of any judgment in such action, to answer to the merits of the original action.

Amend-
ments by
the court.

Enlarging
time to plead
and relieving
from judg-
ments, etc.

SEC. 474. (§ 69.) When the plaintiff is ignorant of the name of a defendant, he may state that fact in the complaint, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered the pleading or proceeding may be amended accordingly.

Suing a
party by a
fictitious
name, when
allowed.

NOTE.—The words, "he may state that fact in the complaint," are added to the original section, so that it may

appear upon the face of the proceedings that the name is a fictitious one.

No error or defect to be regarded unless it affects substantial rights.

SEC. 475. (§ 71.) The court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect.

TITLE VII.

OF THE PROVISIONAL REMEDIES IN CIVIL ACTIONS.

CHAPTER I. *Arrest and bail.*

II. *Claim and delivery of personal property.*

III. *Injunction.*

IV. *Attachment.*

V. *Receivers.*

VI. *Deposit in court.*

CHAPTER I.

ARREST AND BAIL.

SECTION 478. No person to be arrested except as prescribed by this code.

479. Cases in which defendant may be arrested.

480. Order for arrest, by whom made.

481. Affidavit to obtain order, what to contain.

482. Security by plaintiff before order of arrest.

483. Order, when made, and its form.

484. Affidavit and order to be delivered to the sheriff and copy to defendant.

485. Arrest, how made.

486. Defendant to be discharged on bail or deposit.

487. Bail, how given.

488. Surrender of defendant.

489. Same.

490. Bail, how proceeded against.

491. Bail, how exonerated.

492. Delivery of undertaking to plaintiff, and its acceptance or rejection by him.

493. Notice of justification. New undertaking, if other bail.

494. Qualification of bail.

SECTION 495. Justification of bail.

496. Allowance of bail.

497. Deposit of money with sheriff.

498. Payment of money into court by sheriff.

499. Substituting bail for deposit.

500. Money deposited, how applied or disposed of.

501. Sheriff, when liable as bail, and his discharge from liability.

502. Proceedings on judgment against sheriff.

503. Motion to vacate order of arrest or reduce bail. Affidavits on motion.

504. When the order vacated or bail reduced.

SEC. 478. (§ 72.) No person can be arrested in a civil action, except as prescribed in this code.

No person to be arrested except as prescribed by this code.

SEC. 479. (§ 73.) The defendant may be arrested as hereinafter prescribed, in the following cases :

Cases in which defendant may be arrested.

1. In an action for the recovery of money or damages on a cause of action arising upon contract, express or implied, when the defendant is about to depart from the state, with intent to defraud his creditors.

2. In an action for a fine or penalty, or for money or property embezzled, or fraudulently misapplied, or converted to his own use, by a public officer ; or an officer of a corporation, or an attorney, factor, broker, agent or clerk, in the course of his employment as such ; or by any other person in a fiduciary capacity, or for fraudulent misconduct or neglect in office, or in a professional employment ; or for a wilful violation of duty.

3. In an action to recover the possession of personal property, unjustly detained, when the property, or any part thereof, has been fraudulently concealed, removed or disposed of, so that it cannot be found, or taken by the sheriff.

4. When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought ; or in concealing or disposing of the property, for the taking, detention or conversion of which the action is brought.

5. When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors.

SEC. 480. (§ 74.) An order for the arrest of the defend-

Order for arrest, by whom made.

ant must be obtained from a judge of the court in which the action is brought, or from a county judge.

Affidavit to obtain order, what to contain.

SEC. 481. (§ 75.) The order may be made whenever it appears to the judge, by the affidavit of the plaintiff, or some other person, that a sufficient cause of action exists, and that the case is one of those mentioned in section four hundred and seventy-nine. The affidavit must be either positive or upon information and belief; and when upon information and belief, it must state the facts upon which the information and belief are founded. If an order of arrest be made, the affidavit must be filed with the clerk of the county.

Security by plaintiff before order of arrest.

SEC. 482. (§ 76.) Before making the order, the judge must require a written undertaking on the part of the plaintiff, with sureties, to the effect that if the defendant recover judgment, the plaintiff will pay all costs and charges that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which must be at least five hundred dollars. The undertaking must be filed with the clerk of the court.

NOTE.—The form of affidavit of the sureties is omitted. One form will be adopted and one section made to apply to the affidavits of sureties.

Order, when made, and its form.

SEC. 483. (§ 77.) The order may be made at the time of the issuing of the summons, or any time afterwards before judgment. It must require the sheriff of the county where the defendant may be found, forthwith to arrest him and hold him to bail in a specified sum, and to return the order at a time therein mentioned, to the clerk of the court in which the action is pending.

Affidavit and order to be delivered to the sheriff and copy to defendant.

SEC. 484. (§ 78.) The order of arrest, with a copy of the affidavit upon which it is made, must be delivered to the sheriff, who, upon arresting the defendant, must deliver to him the copy of the affidavit, and also, if desired, a copy of the order of arrest.

Arrest, how made.

SEC. 485. (§ 79.) The sheriff must execute the order by arresting the defendant and keeping him in custody until discharged by law.

SEC. 486. (§ 80.) The defendant, at any time before execution, must be discharged from the arrest, either upon giving bail or upon depositing the amount mentioned in the order of arrest.

Defendant to be discharged on bail or deposit.

SEC. 487. (§ 81.) The defendant may give bail by causing a written undertaking to be executed by two or more sufficient sureties, to the effect that they are bound in the amount mentioned in the order of arrest, that the defendant will at all times render himself amenable to the process of the court, during the pendency of the action, and to such as may be issued to enforce the judgment therein, or that they will pay to the plaintiff the amount of any judgment which may be recovered in the action.

Bail, how given.

SEC. 488. (§ 82.) At any time before judgment, or within ten days thereafter, the bail may surrender the defendant in their exoneration; or he may surrender himself to the sheriff of the county where he was arrested.

Surrender of defendant.

SEC. 489. (§ 83.) For the purpose of surrendering the defendant, the bail, at any time or place before they are finally charged, may themselves arrest, or, by a written authority indorsed on a certified copy of the undertaking, may empower the sheriff to do so. Upon the arrest of defendant by the sheriff, or upon his delivery to the sheriff by the bail, or upon his own surrender, the bail are exonerated, if such arrest, delivery or surrender take place before the expiration of ten days after judgment; but if such arrest, delivery or surrender be not made within ten days after judgment, the bail are finally charged on their undertaking, and bound to pay the amount of the judgment within ten days thereafter.

Same.

SEC. 490. (§ 84.) If the bail neglect or refuse to pay the judgment within ten days after they are finally charged an action may be commenced against such bail for the amount of the original judgment.

Bail, how proceeded against.

SEC. 491. (§ 85.) The bail are exonerated by the death of the defendant or his imprisonment in a state prison, or by his legal discharge from the obligation to render himself amenable to the process.

Bail, how exonerated.

Delivery of undertaking to plaintiff, and its acceptance or rejection by him.

SEC. 492. (§ 86.) Within the time limited for that purpose, the sheriff must file the order of arrest in the office of the clerk of the court in which the action is pending, with his return indorsed thereon, together with a copy of the undertaking of the bail. The original undertaking he must retain in his possession until filed, as herein provided. The plaintiff, within ten days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he is deemed to have accepted them, and the sheriff is exonerated from liability. If no notice be served within ten days, the original undertaking must be filed with the clerk of the court.

Notice of justification.

SEC. 493. (§ 87.) Within five days after the receipt of notice, the sheriff or defendant may give to the plaintiff, or his attorney, notice of the justification of the same, or other bail (specifying the places of residence and occupations of the latter), before a judge of the court or county judge, or county clerk, at a specified time and place; the time to be not less than five nor more than ten days thereafter, except by consent of parties. In case other bail be given, there must be a new undertaking.

New undertaking, if other bail.

Qualification of bail.

SEC. 494. (§ 88.) The qualifications of bail are as follows:

1. Each of them shall be a resident and householder, or freeholder, within the county.

2. Each must be worth the amount specified in the order of arrest, or the amount to which the order is reduced, as provided in this chapter, over and above all his debts and liabilities, exclusive of property exempt from execution; but the judge or county clerk, on justification, may allow more than two sureties to justify, severally, in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail.

Justification of bail.

SEC. 495. (§ 89.) For the purpose of justification, each of the bail must attend before the judge or county clerk, at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the judge or clerk, in his discretion, may think proper. The examination

must be reduced to writing, and subscribed by the bail, if required by the plaintiff.

SEC. 496. (§ 90.) If the judge or clerk find the bail sufficient, he must annex the examination to the undertaking, indorse his allowance thereon and cause them to be filed, and the sheriff is thereupon exonerated from liability.

Allowance
of bail.

SEC. 497. (§ 91.) The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. In case the amount of the bail be reduced, as provided in this chapter, the defendant may deposit such amount instead of giving bail. In either case, the sheriff must give the defendant a certificate of the deposit made, and the defendant must be discharged from custody.

Deposit of
money with
sheriff.

SEC. 498. (§ 92.) The sheriff must, immediately after the deposit, pay the same into court, and take from the clerk receiving the same two certificates of such payment, the one of which he shall deliver to the plaintiff's attorney, and the other to the defendant. For any default in making such payment, the same proceedings may be had on the official bond of the sheriff, to collect the sum deposited, as in other cases of delinquency.

Payment of
money into
court by
sheriff.

SEC. 499. (§ 93.) If money is deposited, as provided in the last two sections, bail may be given, and may justify upon notice, at any time before judgment; and on the filing of the undertaking and justification with the clerk, the money deposited must be refunded to the defendant.

Substituting
bail for de-
posit.

SEC. 500. (§ 94.) Where money has been deposited, if it remain on deposit at the time of the recovery of a judgment in favor of the plaintiff, the clerk must, under the direction of the court, apply the same in satisfaction thereof; and after satisfying the judgment, refund the surplus, if any, to the defendant. If the judgment is in favor of the defendant, the clerk must, under like direction of the court, refund to him the whole sum deposited and remaining unapplied.

Money de-
posited, how
applied or
disposed of.

SEC. 501. (§ 95.) If, after being arrested, the defendant

Sheriff, when liable as bail, and his discharge from liability.

escape or is rescued, the sheriff is liable as bail; but he may discharge himself from such liability by the giving bail at any time before judgment.

Proceedings on judgment against sheriff.

SEC. 502. (§ 96.) If a judgment is recovered against the sheriff, upon his liability as bail, and an execution thereon is returned unsatisfied in whole or in part, the same proceedings may be had on his official bond, for the recovery of the whole or any deficiency, as in other cases of delinquency.

Motion to vacate order of arrest or reduce bail.

SEC. 503. (§ 97.) A defendant arrested may at any time before the justification of bail apply to the judge who made the order, or the court in which the action is pending, upon reasonable notice, to vacate the order of arrest or to reduce the amount of bail. If the application is made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs, in addition to those on which the order of arrest was made.

Affidavits on motion.

When the order vacated or bail reduced.

SEC. 504. (§ 98.) If, upon such application, it appears that there was not sufficient cause for the arrest, the order must be vacated, or if it appears that the bail was fixed too high, the amount must be reduced.

CHAPTER II.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

SECTION 509. Delivery of personal property, when it may be claimed.

510. Affidavit and its requisites.

511. Requisition to sheriff to take and deliver the property.

512. Security on the part of the plaintiff and proceedings in serving the order.

513. Exception to sureties and proceedings thereon, or on failure to except.

514. Defendant, when entitled to redelivery.

515. Justification of defendant's sureties.

516. Qualification of sureties.

517. Property, how taken, when concealed in building or inclosure.

518. Property, how kept.

519. Claim of property by third person.

520. Notice and affidavit, when and where to be filed.

SEC. 509. (§ 99.) The plaintiff in an action to recover the possession of personal property may, at the time of issuing the summons, or at any time before answer, claim the delivery of such property to him, as provided in this chapter.

Delivery of personal property, when it may be claimed.

SEC. 510. (§ 100.) Where a delivery is claimed, an affidavit must be made by the plaintiff, or by some one in his behalf, showing—

Affidavit and its requisites

1. That the plaintiff is the owner of the property claimed (particularly describing it) or is entitled to the possession thereof.

2. That the property is wrongfully detained by the defendant.

3. The alleged cause of the detention thereof, according to his best knowledge, information and belief.

4. That it has not been taken for a tax, assessment or fine, pursuant to a statute; or seized under an execution or an attachment against the property of the plaintiff; or if so seized, that it is by statute exempt from such seizure.

5. The actual value of the property.

SEC. 511. (§ 101.) The plaintiff or his attorney may, thereupon, by an indorsement in writing upon the affidavit, require the sheriff of the county where the property claimed may be to take the same from the defendant.

Requisition to sheriff to take and deliver the property.

SEC. 512. (§ 102.) Upon a receipt of the affidavit and notice, with a written undertaking, executed by two or more sufficient sureties, approved by the sheriff, to the effect that they are bound to the defendant in double the value of the property as stated in the affidavit for the prosecution of the action, for the return of the property to the defendants, if return thereof be adjudged, and for the payment to him of such sum as may from any cause be recovered against the plaintiff, the sheriff must forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He must, without delay, serve on the defendant a copy of the affidavit, notice and undertaking, by delivering the same to him personally, if he can be found, or to his agent from whose possession the property is taken; or, if neither can be found, by leaving them at

Security on the part of the plaintiff and proceedings in serving the order

the usual place of abode of either, with some person of suitable age and discretion, or, if neither have any known place of abode, by putting them in the nearest post-office, directed to the defendant.

Exception to
sureties and
proceedings
thereon, or
on failure to
except.

SEC. 513. (§ 103.) The defendant may, within two days after the service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objection to them. When the defendant excepts, the sureties must justify on notice in like manner as upon bail on arrest; and the sheriff is responsible for the sufficiency of the sureties until the objection to them is either waived or until they justify. If the defendant except to the sureties, he cannot reclaim the property as provided in the next section.

Defendant,
when enti-
tled to redel-
ivery.

SEC. 514. (§ 104.) At any time before the delivery of the property to the plaintiff the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant. If a return of the property be not so required within five days after the taking and service of notice to the defendant, it must be delivered to the plaintiff, except as provided in section five hundred and nineteen.

Justification
of defend-
ant's sureties

SEC. 515. (§ 105.) The defendant's sureties, upon notice to the plaintiff of not less than two or more than five days, must justify before a judge or county clerk, in the same manner as upon bail on arrest; and upon such justification the sheriff must deliver the property to the defendant. The sheriff is responsible for the defendant's sureties until they justify, or until the justification is completed or waived, and may retain the property until that time; if they, or others in their place, fail to justify at the time and place appointed, he must deliver the property to the plaintiff.

SEC. 516. (§ 106.) The qualification of sureties must be such as are prescribed by this code, in respect to bail upon an order of arrest.

Qualification
of sureties.

SEC. 517. (§ 107.) If the property or any part thereof be concealed in a building or inclosure, the sheriff must publicly demand its delivery; if it be not delivered he must cause the building or inclosure to be broken open, and take the property into his possession; and, if necessary, he may call to his aid the power of his county.

Property,
how taken,
when con-
cealed in
building or
inclosure.

SEC. 518. (§ 108.) When the sheriff has taken property, as in this chapter provided, he must keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his fees for taking and his necessary expenses for keeping the same.

Property,
how kept.

SEC. 519. (§ 109.) If the property taken be claimed by any other person than the defendant or his agent, and such person make affidavit of his title thereto, or right to the possession thereof, stating the grounds of such title or right, and serve the same upon the sheriff, the sheriff is not bound to keep the property or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, indemnify the sheriff against such claim, by an undertaking, by two sufficient sureties; and no claim to such property by any other person than the defendant or his agent is valid against the sheriff unless so made.

Claim of
property by
third person.

SEC. 520. (§ 110.) The sheriff must file the notice, undertaking and affidavit, with his proceedings thereon, with the clerk of the court in which the action is pending, within twenty days after taking the property mentioned therein.

Notice and
affidavit,
when and
where to be
filed.

CHAPTER III.

INJUNCTION.

SECTION 525. Injunction, what is and who may grant it.

526. When it may be granted.

527. At what time it may be granted, and what is required to obtain it.

SECTION 528. Injunction after answer.

529. Security upon injunction.

530. Order to show cause why injunction should not be granted.

531. Injunction to suspend business of a corporation, how and by whom granted.

532. Motion to vacate or modify injunction.

533. When to be vacated or modified.

Injunction,
what is and
who may
grant it.

SEC. 525. (§ 111.) An injunction is a writ or order requiring a person to refrain from a particular act. It may be granted by the court in which the action is brought, or by a judge thereof, or by a county judge; and when made by a judge, it may be enforced as the order of the court.

When it may
be granted.

SEC. 526. (§ 112.) An injunction may be granted in the following cases:

1. When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually.

2. When it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce great or irreparable injury to the plaintiff.

3. When it appears during the litigation that the defendant is doing or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual.

At what time
it may be
granted, and
what is re-
quired to
obtain it.

SEC. 527. (§ 113.) The injunction may be granted at the time of issuing the summons, upon the complaint, and at any time afterwards, before judgment, upon affidavits. The complaint in the one case, and the affidavits in the other, must show satisfactorily that sufficient grounds exist therefor. No injunction can be granted on the complaint unless it is verified. When granted on the complaint, a copy of the complaint and verification attached must be served with the injunction; when granted upon affidavit, a copy of the affidavit must be served with the injunction.

NOTE.—The original section contained a provision prescribing the form of the verification. This was useless, for

the form is prescribed in the part of this code relating to pleadings.

SEC. 528. (§ 114.) An injunction cannot be allowed after the defendant has answered, unless upon notice, or upon an order to show cause; but in such case the defendant may be restrained until the decision of the court or judge granting or refusing the injunction.

Injunction
after answer.

SEC. 529. (§ 115.) On granting an injunction the court or judge must require, except where the people of the state are a party plaintiff, a written undertaking on the part of the plaintiff, with sufficient sureties, to the effect that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as such party may sustain by reason of the injunction, if the court finally decide that the plaintiff was not entitled thereto.

Security
upon injunc-
tion.

SEC. 530. (§ 116.) If the court or judge deem it proper that the defendant, or any of several defendants, should be heard before granting the injunction, an order may be made requiring cause to be shown, at a specified time and place, why the injunction should not be granted; and the defendant may, in the meantime, be restrained.

Order to
show cause
why injunc-
tion should
not be
granted.

SEC. 531. (§ 117.) An injunction to suspend the general and ordinary business of a corporation cannot be granted except by the court or a judge thereof; nor can it be granted without due notice of the application therefor to the proper officers or managing agent of the corporation, except when the people of this state are a party to the proceeding.

Injunction
to suspend
business of a
corporation,
how and
by whom
granted.

SEC. 532. (§ 118.) If an injunction be granted without notice, the defendant, at any time before the trial, may apply, upon reasonable notice to the judge who granted the injunction, or to the court in which the action is brought, to dissolve or modify the same. The application may be made upon the complaint and the affidavit on which the injunction was granted, or upon affidavit on the part of the defendant, with or without the answer. If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff

Motion to
vacate or
modify in-
junction.

may oppose the same by affidavits or other evidence, in addition to those on which the injunction was granted.

When to be
vacated or
modified.

SEC. 533. (§ 119.) If upon such application it satisfactorily appear that there is not sufficient ground for the injunction, it must be dissolved; or if it satisfactorily appear that the extent of the injunction is too great, it must be modified.

CHAPTER IV.

ATTACHMENT.

SECTION 537. Attachment, when and in what cases may issue.

538. Affidavit for attachment, what to contain.

539. Undertaking on attachment.

540. Writ, to whom directed and what to state.

541. Shares of stock and debts due defendant, how attached and disposed of.

542. How real and personal property shall be attached.

543. Attorney to give written instructions to sheriff what to attach.

544. Garnishment, when garnishee liable to plaintiff.

545. Citation to garnishee to appear before a court or judge.

546. Inventory, how made. Party refusing to give memorandum may be compelled to pay costs.

547. Perishable property, how sold. Accounts without suit to be collected.

548. Property attached may be sold as under execution, if the interests of the parties require.

549. When property claimed by a third party, how tried.

550. If plaintiff obtains judgment, how satisfied.

551. When there remains a balance due, how collected.

552. When suits may be commenced on the undertaking.

553. If defendant recover judgment, what the sheriff is to deliver.

554. Proceedings to release attachment, before whom taken.

555. Attachment, in what cases it may be released and upon what terms.

556. When a motion to discharge attachment may be made, and upon what grounds.

557. When motion made on affidavit, it may be opposed by affidavit.

558. When writ must be discharged.

559. When writ to be returned.

Attachment,
when and in
what cases
may issue.

SEC. 537. (§ 120.) The plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached as security for the

satisfaction of any judgment that may be recovered, unless defendant give security to pay such judgment, as in this chapter provided, in the following cases:

1 In an action upon a contract, express or implied, for the direct payment of money, which contract is made or is payable in this state, and is not secured by mortgage, lien or pledge upon real or personal property; or, if so secured, that such security has been rendered nugatory by the act of the defendant.

2. In an action upon a contract, express or implied, against a defendant not residing in this state.

SEC. 538. (§ 121.) The clerk of the court must issue the writ of attachment upon receiving an affidavit by, or on behalf of, plaintiff, showing—

Affidavit for attachment, what to contain.

1. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness, over and above all legal set-offs or counter claims,) upon a contract, express or implied, for the direct payment of money, and that such contract was made or is payable in this state, and that the payment of the same has not been secured by any mortgage, lien or pledge upon real and personal property; or,

2. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness, as near as may be, over and above all legal set-offs or counter claims,) and that the defendant is a non-resident of the state; and,

3. That the sum for which the attachment is asked is an actual bona fide existing debt, due and owing from the defendant to the plaintiff, and that the attachment is not sought, and the action is not prosecuted, to hinder, delay or defraud any creditor or creditors of the defendant.

SEC. 539. (§ 122.) Before issuing the writ, the clerk must require a written undertaking on the part of the plaintiff, in a sum not less than two hundred dollars, and not exceeding the amount claimed by the plaintiff, with sufficient sureties, to the effect that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking.

Undertaking on attachment.

Writ, to
whom direct-
ed and what
to state.

SEC. 540. (§ 123.) The writ must be directed to the sheriff of any county in which property of such defendant may be, and must require him to attach and safely keep all the property of such defendant within his county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint, unless the defendant give him security by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been, or is about to be, attached; in which case, to take such undertaking. Several writs may be issued at the same time, to the sheriffs of different counties.

Shares of
stock and
debts due
defendant,
how attached
and disposed
of.

SEC. 541. (§ 124.) The rights or shares which the defendant may have in the stock of any corporation or company, together with the interest and profit thereon, and all debts due such defendant, and all other property in this state of such defendant not exempt from execution, may be attached, and if judgment be recovered, be sold to satisfy the judgment and execution.

How real
and personal
property
shall be at-
tached.

SEC. 542. (§ 125.) The sheriff to whom the writ is directed and delivered, must execute the same without delay, and if the undertaking mentioned in section five hundred and forty be not given, as follows:

1. Real property, standing upon the records of the county in the name of the defendant, must be attached by leaving a copy of the writ with an occupant thereof; or, if there be no occupant, by posting a copy in a conspicuous place thereon, and filing a copy, together with a description of the property attached, with the recorder of the county.

2. Real property, or any interest therein, belonging to the defendant, and held by any other person, or standing on the records of the county in the name of any other person, must be attached by leaving with such person, or his agent, a copy of the writ, and a notice that such real property (giving a description thereof) and any interest therein, belonging to the defendant, are attached pursuant to such writ, and filing a copy of such writ and notice with the recorder of the county, and leaving a copy of

such writ and notice with an occupant of such property; or, if there be no occupant, by posting a copy thereof in a conspicuous place thereon.

3. Personal property, capable of manual delivery, must be attached by taking it into custody.

4. Stock or shares, or interest in stock or shares, of any corporation or company, must be attached by leaving with the president, or other head of the same, or the secretary, cashier or other managing agent thereof, a copy of the writ, and a notice stating that the stock or interest of the defendant is attached, in pursuance of such writ.

5. Debits and credits, and other personal property, not capable of manual delivery, must be attached by leaving with the person owning such debts, or having in his possession, or under his control, such credits and other personal property, or with his agent, a copy of the writ, and a notice that the debts owing by him to the defendant, on the credits and other personal property in his possession, or under his control, belonging to the defendant, are attached in pursuance of such writ.

SEC. 543. (§ 126.) Upon receiving information in writing from the plaintiff or his attorney, that any person has in his possession, or under his control, any credits or other personal property belonging to the defendant, or is owing any debt to the defendant, the sheriff must serve upon such person a copy of the writ, and a notice that such credits, or other property or debts, as the case may be, are attached in pursuance of such writ.

Attorney to give written instructions to sheriff what to attach.

SEC. 544. (§ 127.) All persons having in their possession, or under their control, any credits or other personal property belonging to the defendant, or owing any debts to the defendant at the time of service upon them of a copy of the writ and notice, as provided in the last two sections, shall be, unless such property be delivered up or transferred, or such debts be paid to the sheriff, liable to the plaintiff for the amount of such credits, property or debts, until the attachment be discharged, or any judgment recovered by him be satisfied.

Garnishment, when garnishee liable to plaintiff.

SEC. 545. (§ 128.) Any person owing debts to the defendant, or having in his possession, or under his control,

Citation to garnishee to appear before a court or judge.

any credits or other personal property belonging to the defendant, may be required to attend before the court or judge, or a referee appointed by the court or judge, and be examined on oath respecting the same. The defendant may also be required to attend for the purpose of giving information respecting his property, and may be examined on oath. The court or judge may, after such examination, order personal property, capable of manual delivery, to be delivered to the sheriff on such terms as may be just, having reference to any liens thereon or claims against the same, and a memorandum to be given of all other personal property, containing the amount and description thereof.

Inventory,
how made.

SEC. 546. (§ 129.) The sheriff must make a full inventory of the property attached, and return the same with the writ. To enable him to make such return as to debts and credits attached, he must request, at the time of service, the party owing the debt or having the credit to give him a memorandum, stating the amount and description of each; and if such memorandum be refused, he must return the fact of refusal with the writ. The party refusing to give the memorandum may be required to pay the costs of any proceedings taken for the purpose of obtaining information respecting the amounts and description of such debt or credit.

Party refus-
ing to give
memoran-
dum may be
compelled to
pay costs.

Perishable
property,
how sold.

SEC. 547. (§130.) If any of the property attached be perishable, the sheriff must sell the same in the manner in which such property is sold on execution. The proceeds, and other property attached by him, must be retained by him to answer any judgment that may be recovered in the action, unless sooner subjected to execution upon another judgment recovered previous to the issuing of the attachment. Debts and credits attached may be collected by him, if the same can be done without suit. The sheriff's receipt is a sufficient discharge for the amount paid.

Accounts
without suit
to be col-
lected.

Property at-
tached may
be sold as
under execu-
tion, if the
interests of
the parties
require.

SEC. 548. (§ 654.) Whenever property has been taken by an officer under a writ of attachment, and it is made to appear satisfactorily to the court or a judge thereof, or a county judge, that the interest of the parties to the action will be subserved by a sale thereof, the court or

judge may order such property to be sold in the same manner as property is sold under an execution, and the proceeds to be deposited in the court, to abide the judgment in the action. Such order can be made only upon notice to the adverse party or his attorney, in case such party have been personally served with a summons in the action.

Sec. 549. (§ 131.) If any personal property attached be claimed by a third person as his property, the sheriff may summon a jury of six men to try the validity of such claim; and such proceedings shall be had thereon, with the like effect, as in case of a claim after levy upon execution.

When property claimed by a third party, how tried.

Sec. 550. (§ 132.) If judgment be recovered by the plaintiff, the sheriff must satisfy the same out of the property attached by him which has not been delivered to the defendant, or a claimant as hereinbefore provided, or subjected to execution on another judgment recovered previous to the issuing of the attachment, if it be sufficient for that purpose:

If plaintiff obtains judgment, how satisfied.

1. By paying to the plaintiff the proceeds of all sales of perishable property sold by him, or of any debts or credits collected by him, or so much as shall be necessary to satisfy the judgment.

2. If any balance remain due, and an execution shall have been issued on the judgment, he must sell under the execution so much of the property, real or personal, as may be necessary to satisfy the balance, if enough for that purpose remain in his hands. Notices of the sales must be given, and the sales conducted as in other cases of sales on execution.

Sec. 551. (§ 133.) If, after selling all the property attached by him remaining in his hands, and applying the proceeds, together with the proceeds of any debts or credits collected by him, deducting his fees, to the payment of the judgment, any balance shall remain due, the sheriff must proceed to collect such balance as upon an execution in other cases. Whenever the judgment shall have been paid, the sheriff, upon reasonable demand, must

Where there remains a balance due, how collected.

deliver over to the defendant the attached property remaining in his hands, and any proceeds of the property attached unapplied on the judgment.

When suits may be commenced on the undertaking.

SEC. 552. (§ 134.) If the execution be returned unsatisfied in whole or in part, the plaintiff may prosecute any undertaking given pursuant to section five hundred and forty or section five hundred and fifty-five, or he may proceed as in other cases upon the return of an execution.

If defendant recover judgment, what the sheriff is to deliver.

SEC. 553. (§ 135.) If the defendant recover judgment against the plaintiff, any undertaking received in the action, all the proceeds of sales and money collected by the sheriff, and all the property attached remaining in the sheriff's hands, must be delivered to the defendant or his agent; the order of attachment shall be discharged, and the property released therefrom.

Proceedings to release attachment, before whom taken.

SEC. 554. (§ 136.) Whenever the defendant has appeared in the action, he may, upon reasonable notice to the plaintiff, apply to the court in which the action is pending, or to the judge thereof, or to a county judge, for an order to discharge the attachment, wholly or in part; and upon the execution of the undertaking mentioned in the next section, an order may be made, releasing from the operation of the attachment any or all of the property attached, and all of the property so released, and all of the proceeds of the sales thereof, be delivered to the defendant, upon the justification of the sureties on the undertaking, if required by the plaintiff.

Attachment, in what cases it may be released and upon what terms.

SEC. 555. (§ 137.) Before the making such order, the court or judge must require an undertaking on behalf of the defendant, by at least two sureties, residents and freeholders or householders in the county, to the effect that in case the plaintiff recover judgment in the action, defendant will, on demand, redeliver the attached property so released, to the proper officer, to be applied to the payment of the judgment, and that in default thereof the defendant and sureties will, on demand, pay to the plaintiff the full value of the property released. The court or judge making such order may fix the sum for which the undertaking must be executed, and if necessary in fixing such sum to know the value of the

property released, the same may be appraised by three disinterested persons to be appointed for that purpose. The sureties may be required to justify before the court or judge, and the property attached cannot be released from the attachment without their justification, if the same be required.

SEC. 556. (§ 138.) The defendant may, also, any time before the time for answering expires, apply, on motion, upon reasonable notice to the plaintiff, to the court in which the action is brought, or to the judge thereof, or to a county judge, that the attachment be discharged on the ground that the writ was improperly or irregularly issued.

When a motion to discharge attachment may be made, and upon what grounds.

SEC. 557. (§ 139.) If the motion be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence, in addition to those on which the attachment was made.

When motion made on affidavit, it may be opposed by affidavit.

SEC. 558. (§ 140.) If, upon such application, it satisfactorily appears that the writ of attachment was improperly or irregularly issued, it must be discharged.

When writ must be discharged.

SEC. 559. (§ 141.) The sheriff must return the writ of attachment with the summons, if issued at the same time; otherwise, within twenty days after its receipt, with a certificate of his proceedings indorsed thereon or attached thereto.

When writ to be returned.

CHAPTER V.

RECEIVERS.

SECTION 564. Appointment of receiver.

565. Appointment of receivers upon dissolution of corporations.

566. Who shall not be appointed.

567. Oath and undertaking.

568. Powers of receivers.

569. Investment of funds.

SEC. 564. A receiver may be appointed by the court in which an action is pending, or by the judge thereof—

Appointment of receiver.

1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owing or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed or materially injured.

2. In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt.

3. After judgment, to carry the judgment into effect.

4. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or in proceedings in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment.

5. In the cases when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights.

6. In all other cases where receivers have heretofore been appointed by the usages of the courts of equity.

Appoint-
ment of re-
ceivers upon
dissolution
of corpora-
tions.

SEC. 565. Upon the dissolution of any corporation, the district court of the county in which the corporation carries on its business, or has its principal place of business, on application of any creditor of the corporation, or of any stockholder or member thereof, may appoint one or more persons to be receivers or trustees of the corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, and to pay the outstanding debts thereof, and to divide the moneys and other property that shall remain over, among the stockholders or members.

Statutes of 1850, p. 347, §§ 16, 18; 1862, p. 199, § 25.

Who shall
not be ap-
pointed.

SEC. 566. No party, or attorney, or person interested in an action, can be appointed receiver therein.

SEC. 567. Before entering upon his duties, the receiver must be sworn to perform them faithfully, and with one or more sureties, approved by the court or judge, execute an undertaking to such person, and in such sum as the court or judge may direct, to the effect that he will faithfully discharge the duties of receiver in the action, and obey the orders of the court therein.

Oath and undertaking.

SEC. 568. The receiver has, under the control of the court, power to bring and defend actions in his own name, as receiver; to take and keep possession of the property, to receive rents, collect debts, to compound for and compromise the same, to make transfers, and generally to do such acts respecting the property as the court may authorize.

Powers of receiver.

SEC. 569. Funds in the hands of a receiver may be invested upon interest, by order of the court; but no such order can be made, except upon the consent of all the parties to the action.

Investment of funds.

CHAPTER VI.

DEPOSIT IN COURT.

SECTION 572. Deposit in court.

573. Money paid to clerk must be deposited with county treasurer.

574. Manner of enforcing the order.

SEC. 572. (§ 142.) When it is admitted by the pleading, or shown upon the examination of a party, that he has in his possession or under his control any money or other thing capable of delivery, which, being the subject of litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same, upon motion, to be deposited in court or delivered to such party, upon such conditions as may be just, subject to the further direction of the court.

Deposit in court.

SEC. 573. If the money is deposited in court it must be paid to the clerk, who must deposit it with the county treasurer, by him to be held subject to the order of the

Money paid to clerk must be deposited with county treasurer.

court. For the safe keeping of the money deposited with him the treasurer is liable on his official bond.

Statutes of 1864, p. 468.

Manner of
enforcing the
order.
N. S.

SEC. 574. Whenever, in the exercise of its authority, a court has ordered the deposit or delivery of money or other thing, and the order is disobeyed, the court, beside punishing the disobedience, may make an order requiring the sheriff to take the money or thing and deposit or deliver it in conformity with the direction of the court.

TITLE VIII.

OF THE TRIAL AND JUDGMENT IN CIVIL ACTIONS.

CHAPTER I. *Judgment in general.*

II. *Judgment upon failure to answer.*

III. *Issues—the mode of trial and postponements.*

IV. *Trial by jury.*

V. *Trial by the court.*

VI. *Of references and trials by referees.*

VII. *Provisions relating to trials in general.*

VIII. *The manner of giving and entering judgment.*

CHAPTER I.

JUDGMENT IN GENERAL.

SECTION 577. Judgment defined.

578. Judgment may be for or against one of the parties.

579. Judgment may be against one party and action proceed as to others.

580. The relief to be awarded to the plaintiff.

581. Action may be dismissed or nonsuit entered.

582. All other judgments are on the merits.

Judgment
defined.

SEC. 577. (§ 144.) A judgment is the final determination of the rights of the parties in an action or proceeding.

NOTE.—The original section contained the words “and may be entered in term or vacation.” We omit them, first, because they are not part of the definition ; second, because the same provision is contained in the first part of this code.

SEC. 578. (§ 145.) Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves.

Judgment may be for or against one of the parties.

SEC. 579. (§ 146.) In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper.

Judgment may be against one party and action proceed as to others.

SEC. 580. (§ 147.) The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint and embraced within the issue.

The relief to be awarded to the plaintiff.

SEC. 581. (§ 148.) An action may be dismissed or a judgment of nonsuit entered in the following cases:

Action may be dismissed or nonsuit entered.

1. By the plaintiff himself, at any time before trial, upon the payment of costs, if a counter claim has not been made. If a provisional remedy has been allowed, the undertaking must thereupon be delivered by the clerk to the defendant, who may have his action thereon.

2. By either party, upon the written consent of the other.

3. By the court, when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal.

4. By the court, when, upon the trial, and before the final submission of the case, the plaintiff abandons it.

5. By the court, upon motion of the defendant, when, upon the trial, the plaintiff fails to prove a sufficient case for the jury.

The dismissal mentioned in the first two subdivisions is made by an entry in the clerk's register. Judgment may thereupon be entered accordingly.

SEC. 582. (§ 149.) In every case, other than those mentioned in the last section, judgment must be rendered on the merits.

All other judgments are on the merits.

CHAPTER II.

JUDGMENT UPON FAILURE TO ANSWER.

SECTION 585. In what cases judgment may be had upon the failure of the defendant to answer.

In what cases judgment may be had upon the failure of the defendant to answer

SEC. 585. (§ 150.) Judgment may be had, if the defendant fail to answer the complaint, as follows :

1. In an action arising upon contract for the recovery of money or damages only, if no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, the clerk, upon application of the plaintiff, must enter the default of the defendant, and immediately thereafter enter judgment for the amount specified in the summons, including the costs, against the defendant, or against one or more of several defendants, in the cases provided for in section four hundred and thirteen.

2. In other actions, if no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, the clerk must enter the default of the defendant; and thereafter the plaintiff may apply at the first or any subsequent term of the court for the relief demanded in the complaint. If the taking of an account, or the proof of any fact, is necessary to enable the court to give judgment, or to carry the judgment into effect, the court may take the account or hear the proof; or may, in its discretion, order a reference for that purpose. And where the action is for the recovery of damages, in whole or in part, the court may order the damages to be assessed by a jury; or if, to determine the amount of damages, the examination of a long account be involved, by a reference as above provided.

3. In actions, where the service of the summons was by publication, the plaintiff, upon the expiration of the time for answering, may, upon proof of the publication, and that no answer has been filed, apply for judgment; and the court must thereupon require proof to be made of the demand mentioned in the complaint; and if the defendant be not a resident of the state, must require the plaintiff or his agent to be examined on oath, respecting any pay-

ments that have been made to the plaintiff, or to any one for his use, on account of such demand, and may render judgment for the amount which he is entitled to recover.

CHAPTER III.

ISSUES—THE MODE OF TRIAL AND POSTPONEMENTS.

Section 588. Issue defined, and the different kinds.

589. Issue of law, how raised.

590. Issue of fact, how raised.

591. Issue of law, how tried.

592. Issue of fact, how tried. When issues both of law and fact, the former to be first disposed of.

593. Clerk must enter causes on the calendar, to remain until disposed of.

594. Parties may bring issue to trial.

595. Motion to postpone a trial for absence of testimony, requisites of.

596. In cases of adjournment a party may have the testimony of any witness taken.

Sec. 588. (§ 151.) Issues arise upon the pleadings when a fact or conclusion of law is maintained by the one party and is controverted by the other. They are of two kinds:

Issue defined, and the different kinds.

1. Of law; and,
2. Of fact.

Sec. 589. (§ 152.) An issue of law arises upon a demurrer to the complaint or answer, or to some part thereof.

Issue of law, how raised.

Sec. 590. (§ 153.) An issue of fact arises—

1. Upon a material allegation in the complaint controverted by the answer; and,

2. Upon new matters in the answer, except an issue of law is joined thereon.

Issue of fact, how raised.

Sec. 591. (§ 154) An issue of law must be tried by the court, unless it is referred upon consent.

Issue of law, how tried.

Sec. 592. (§ 155) An issue of fact must be tried by a jury, unless a jury trial is waived, or a reference be

Issue of fact, how tried.

When issues both of law and fact, the former to be first disposed of.

ordered, as provided in this code. Where there are issues both of law and fact, the issues of law must be first disposed of.

Clerk must enter causes on the calendar, to remain until disposed of.

SEC. 593. (§ 156.) The clerk must enter causes upon the calendar of the court according to the date of issue. Causes once placed on the calendar for a general or special term, if not tried or heard at such term, must remain upon the calendar from court to court, until finally disposed of.

Parties may bring issue to trial.

SEC. 594. (§ 157.) Either party may bring an issue to trial or to a hearing, and in the absence of the adverse party, unless the court, for good cause, otherwise direct, may proceed with his case, and take a dismissal of the action, or a verdict or judgment, as the case may require.

Motion to postpone a trial for absence of testimony, requisites of.

SEC. 595. (§ 158.) A motion to postpone a trial on the ground of the absence of evidence can only be made upon affidavit, showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it. The court may also require the moving party to state, upon affidavit, the evidence which he expects to obtain; and if the adverse party thereupon admit that such evidence would be given and that it be considered as actually given on the trial, or offered and overruled as improper, the trial must not be postponed.

In cases of adjournment a party may have the testimony of any witness taken.

SEC. 596. (§ 664.) The party obtaining a postponement of a trial in any court of record must, if required by the adverse party, consent that the testimony of any witness of such adverse party, who is in attendance, be then taken by deposition before a judge or clerk of the court in which the case is pending, or before such notary public as the court may indicate, which must accordingly be done, and the testimony so taken may be read on the trial, with the same effect, and subject to the same objections, as if the witnesses were produced.

CHAPTER IV.

TRIAL BY JURY.

ARTICLE I. FORMATION OF JURY.

II. CONDUCT OF THE TRIAL.

III. THE VERDICT.

ARTICLE I.

FORMATION OF THE JURY.

SECTION 600. Jury, how drawn.

601. Challenges. Each party entitled to four peremptory challenges.

602. Grounds of challenge.

603. Challenges, how tried.

604. Jury to be sworn.

SEC. 600. (§ 159.) When the action is called for trial by jury, the clerk must draw from the trial jury box of the court the ballots containing the names of the jurors, until the jury is completed or the ballots are exhausted.

Jury, how drawn.

NOTE.—The original section contained provisions as to the number to compose a jury, the manner of summoning talesmen and the preparation of a trial jury box. All these provisions are contained in a former part of this code, under the head of “jurors.”

SEC. 601. (§161.) Either party may challenge the jurors, but when there are several parties on either side, they must join in a challenge before it can be made. The challenges are to individual jurors, and are either peremptory or for cause. Each party is entitled to four peremptory challenges.

Challenges.

Each party entitled to four peremptory challenges.

SEC. 602. (§ 162.) Challenges for cause may be taken on one or more of the following grounds:

Grounds of challenge.

1. A want of any of the qualifications prescribed by this code to render a person competent as a juror.

2. Consanguinity or affinity, within the third degree, to any party.

3. Standing in the relation of guardian and ward, master and servant, employer and clerk or principal and agent, to either party, or being a member of the family

of either party, or a partner in the business with either party, or being security on any bond or obligation for either party.

4. Having served as a juror or been a witness on a previous trial between the same parties, for the same cause of action.

5. Interest on the part of the juror in the event of the action or in the main question involved in the action, except the interest of the juror as a member or citizen of a municipal corporation.

6. Having formed or expressed an unqualified opinion or belief as to the merits of the action.

7. The existence of a state of mind in the juror evincing enmity against, or bias to, either party.

Challenges,
how tried

SEC. 603. (§ 163.) Challenges for cause must be tried by the court. The juror challenged and any other person may be examined as a witness on the trial of the challenge.

Jury to be
sworn.

SEC. 604. (§ 160.) As soon as the jury is completed, an oath must be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between ———, the plaintiff, and ———, defendant, and a true verdict render according to the evidence.

ARTICLE II.

CONDUCT OF THE TRIAL.

SECTION 607. Order of proceedings on trial.

608. Charge to the jury. Court must furnish in writing, upon request, the points of law contained therein.

609. Special instructions.

610. View by jury of the premises.

611. Admonition when jury permitted to separate.

612. Jury may take with them certain papers.

613. Deliberation of jury, how conducted.

614. May come into court for further instructions.

615. Proceedings in case a juror become sick.

616. When prevented from giving verdict, the cause may be again tried.

617. While jury are absent, court may adjourn from time to time. Sealed verdict. Final adjournment discharges the jury.

618. Verdict, how declared. Form of. Polling the jury.

619. Proceedings when verdict is informal.

SEC. 607. When the jury has been sworn in, the trial must proceed in the following order, unless the judge, for special reasons, otherwise directs:

Order of
proceedings
on trial.
N. 8.

1. The plaintiff, after stating the issue and his case, must produce the evidence on his part.

2. The defendant may then open his defence, and offer his evidence in support thereof.

3. The parties may then respectively offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case.

4. When the evidence is concluded, unless the case is submitted to the jury on either side or on both sides without argument, the plaintiff must commence and may conclude the argument.

5. If several defendants, having separate defences, appear by different counsel, the court must determine their relative order in the evidence and argument.

6. The court may then charge the jury.

SEC. 608. (§ 165.) In charging the jury the court may state to them all matters of law which it thinks necessary for their information in giving their verdict; and, if it state the testimony of the case, it must inform the jury that they are the exclusive judges of all questions of fact. The court must furnish to either party, at the time, upon request, a statement in writing of the points of law contained in the charge; or sign, at the time, a statement of such points prepared and submitted by the counsel of either party.

Charge to
the jury.

Court must
furnish in
writing, on
request, the
points of law
contained
therein.

SEC. 609. Where either party asks special instructions to be given to the jury, the court must either give such instruction, as requested, or refuse to do so, or give the instruction with a modification, in such manner that it may distinctly appear what instructions were given in whole or in part.

Special
instructions.
N. 8.

SEC. 610. When in the opinion of the court it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted, in a body, under the charge of an officer, to the place, which

View by
jury of the
premises.

shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent no person, other than the person so appointed, shall speak to them on any subject connected with the trial.

Admonition
when jury
permitted
to separate.

SEC. 611. If the jury are permitted to separate, either during the trial or after the case is submitted to them, they shall be admonished by the court that it is their duty not to converse with, or suffer themselves to be addressed by, any other person, on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.

Jury may
take with
them certain
papers.

SEC. 612. (§ 167.) Upon retiring for deliberation the jury may take with them the written instructions given, all papers (except depositions) which have been received as evidence in the cause, or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them in possession; and they may also take with them notes of the testimony or other proceedings on the trial, taken by themselves or any of them, but none taken by any other person.

Deliberation
of jury, how
conducted.

SEC. 613. (§ 166.) When the case is finally submitted to the jury, they may decide in court or retire for deliberation. If they retire, they must be kept together, in some convenient place, under charge of an officer, until they agree upon a verdict or are discharged by the court, subject to the discretion of the court to permit them to separate temporarily at night, and at their meals. The officer having them under his charge must not suffer any communication to be made to them, or make any himself, except to ask them if they are agreed upon their verdict, unless by order of the court; and he must not, before their verdict is rendered, communicate to any person the state of their deliberations, or the verdict agreed upon.

May come
into court
for further
instructions.

SEC. 614. (§ 168.) After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court, the information required must be

given in the presence of, or after notice to, the parties or counsel.

SEC. 615. (§ 164.) If, after the impanelling of the jury, and before verdict, a juror become sick, so as to be unable to perform his duty, the court may order him to be discharged. In that case the trial may proceed with the other jurors, or a new jury may be sworn and the trial begin anew; or the jury may be discharged, and a new jury then or afterwards impanelled.

Proceedings
in case a ju-
ror becomes
sick.

SEC. 616. (§ 169.) In all cases where the jury are discharged, or prevented from giving a verdict, by reason of accident or other cause, during the progress of the trial, or after the cause is submitted to them, the action may be again tried immediately, or at a future time, as the court may direct.

When pre-
vented from
giving ver-
dict, the
cause may be
again tried.

SEC. 617. (§ 170.) While the jury are absent the court may adjourn, from time to time, in respect to other business; but it is nevertheless open for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged. The court may direct the jury to bring in a sealed verdict, at the opening of the court, in case of an agreement during a recess or adjournment for the day. A final adjournment of the court for the term discharges the jury.

While jury
are absent,
court may
adjourn from
time to time.

Scaled
verdict.

Final ad-
journment
discharges
the jury.

SEC. 618. When the jury have agreed upon their verdict, they must be conducted into court, their names called by the clerk, and the verdict rendered by their foreman. The verdict must be written, signed by the foreman, and must be read by the clerk to the jury, and the inquiry made whether it is their verdict. If any juror disagrees, they must be sent out again; but if no disagreement be expressed, and neither party requires the jury to be polled, the verdict is complete and the jury discharged from the case. Either party may require the jury to be polled, which is done by the court or clerk asking each juror if it is his verdict. If any one answer in the negative, the jury must again be sent out.

Verdict, how
declared.

Form of.

Polling the
jury.

SEC. 619. When the verdict is announced, if it is informal or insufficient, in not covering the issue submit-

Proceedings
when verdict
is informal.

ted, it may be corrected by the jury under the advice of the court, or the jury may be again sent out.

NOTE.—The three preceding sections are substituted for sections 171, 172 and 173 of the practice act. The substituted sections conform to the existing practice in most of the courts, i. e., in requiring the verdict to be in writing. Provision as to recording verdict is inserted in the last section of the succeeding chapter.

ARTICLE III.

THE VERDICT.

SECTION 624. General and special verdicts defined.

625. When a general or special verdict may be rendered.

626. Verdict in actions for recovery of money or on establishing counter claim.

627. Verdict in actions for the recovery of specific personal property.

628. Entry of verdict.

General and special verdicts defined.

SEC. 624. (§ 174.) The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant; a special verdict is that by which the jury find the facts only, leaving the judgment to the court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented, as that nothing shall remain to the court but to draw from them conclusions of law.

When a general or special verdict may be rendered.

SEC. 625. (§ 175.) In an action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases the court may direct the jury to find a special verdict in writing, upon all or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. The special verdict or finding must be filed with the clerk and entered upon the minutes. Where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly.

Sec. 626. (§ 176.) When a verdict is found for the plaintiff, in an action for the recovery of money, or for the defendant, when a counter claim for the recovery of money is established, exceeding the amount of the plaintiff's claim as established, the jury must also find the amount of the recovery.

Verdict in actions for recovery of money or on establishing counter claim.

Sec. 627. (§ 177.) In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant, by his answer, claim a return thereof, the jury, if their verdict be in favor of the plaintiff, or if, being in favor of the defendant, they also find that he is entitled to a return thereof, must find the value of the property, and may, at the same time, assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the taking or detention of such property.

Verdict in actions for the recovery of specific personal property.

Sec. 628. (§ 178.) Upon receiving a verdict, an entry must be made by the clerk in the minutes of the court, specifying the time of trial, the names of the jurors and witnesses, and setting out the verdict at length, and where special verdict is found, either the judgment rendered thereon, or if the case be reserved for argument or further consideration, the order thus reserving it.

Entry of verdict.

CHAPTER V.

TRIAL BY THE COURT.

Section 631. When and how trial by jury may be waived.

632. Upon trial by court decision to be in writing and filed within twenty days.

633. Facts found and conclusions of law must be separately stated. Judgment on.

634. Finding, how prepared.

635. Proceedings after determination of issue of law.

Sec. 631. (§ 179) Trial by jury may be waived by the several parties to an issue of fact, in actions arising on contract, and with the assent of the court in other actions, in the manner following:

When and how trial by jury may be waived.

1. By failing to appear at the trial
2. By written consent, in person or by attorney, filed with the clerk.
3. By oral consent, in open court, entered in the minutes.

The court may prescribe by rule what shall be deemed a waiver in other cases.

Upon trial by court, decision to be in writing and filed within twenty days. N. S.

SEC. 632. Upon the trial of a question of fact by the court, its decision must be given in writing and filed with the clerk within twenty days after the cause is submitted for decision, and unless the decision is filed within that time the action must again be tried.

Facts found and conclusions of law must be separately stated. Judgment on

SEC. 633. In giving the decision, the facts found and the conclusions of law must be separately stated. Judgment upon the decision must be entered accordingly.

NOTE.—The two preceding sections are framed upon the theory—

1. That speedy decisions are desirable.
2. That the system of “implied” findings ought not to be tolerated.

First—We provide that all causes tried by the court must be decided within twenty days after their final submission. Whilst it is important that all cases should be correctly decided, in the first instance, it is equally important that they should be speedily decided. The expense attending litigation in this state is so great, that as a general rule a person had better in the first instance lose his estate, than at the end of three years litigation find his claim to it established, but the title, by the delay, transferred to the attorneys and other officers of the court. There is scarcely a case that a judge with ordinary industry cannot as well decide within ten days as within ten years. If it involves points of great difficulty it goes to the supreme court—and the sooner it reaches there the better for both parties. It may be said that where the judge holds court in counties distant from each other he may not be able to forward his decision within the time allowed. The answer to this is, that he ought to decide the case before he leaves. Another advantage to inure from requiring the decision to be filed within a given time is, that all notices of filing decisions may be dispensed with. The attorney may, at the end of twenty days, by inquiry, ascertain whether or not a decision has been made. And in drafting sections relative to motions for new trial, etc., this period of twenty days has been taken into consideration, and no movement is required by either party within that time.

Second—The objections to the present system of implied

findings are so numerous that there is, as far as we have been able to take the sense of the profession upon the subject, a universal desire to do away with it.

Findings should stand upon the same footing as special verdicts. In fact, it may be said that if any presumptions are to be indulged in, they should be in favor of the latter; for juries are composed of laymen, whilst judges are presumed to be learned in the law. Yet under the present system we have the absurdity of requiring the findings made by the jury—by men unlearned in the law—to support any judgment that may be rendered thereon; whilst the finding made by the learned judge will support the judgment, if the judgment could be supported upon any conceivable state of facts consistent with them.

Upon this topic says Justice Sanderson, speaking for the court, in *Tewksbury vs. Magraff* (33 Cal. 247):

“It may well be doubted whether the act of the 20th of May, 1861 (so far as it relates to findings, and reproduced in the amendments of 1866 to section 180 of the practice act), is not productive of more mischief than good. It certainly proceeds upon an illogical theory, for it inverts the natural and logical order of the proceedings. Instead of making it the duty of the successful party to see that the findings contain facts sufficient to sustain the judgment, it makes it the duty of the unsuccessful party to see that it contains facts sufficient to reverse it. Instead of making the finding a consistent and visible foundation for the judgment to stand upon, the statute converts it into air or a mine for its explosion. This change certainly detracts from the logic of the judgment roll, the various parts of which, like the members of a Macedonian phalanx, should rest upon and support each other, and entails a practice which, in a majority of cases, defeats the ends which findings were intended to subserve.”

It is believed by the commission that the supreme court, as now constituted, are unanimous in their condemnation of the system of implied findings. They occupy a position that enables them to see the evils arising from it, and their opinion ought to have controlling weight upon the subject.

SEC. 634. At the time the cause is submitted, the judge may direct either or both of the parties to prepare findings of fact, and when so directed, the party must within two days prepare and serve upon his adversary, and submit to the judge such findings, and may within two days thereafter briefly suggest in writing to the judge why he desires findings upon the points included within the findings prepared by himself, or why he objects to findings upon the points included within the findings prepared by his adversary. The judge may adopt, modify or reject the findings so submitted. If, at the time of the submission of the cause, the judge does not direct the preparation of findings, or if none are prepared and sub-

Finding. how prepared.

mitted within the time prescribed, or those prepared are rejected, then he must himself prepare the findings.

NORM.—In the preceding section we have sought to incorporate provisions that would prevent the abuses that arise from the findings being prepared and submitted by the prevailing party. They are often signed, as a matter of course, and contain matter that, if called to the attention of the court, would be stricken out. In framing this section we have adopted suggestions kindly made to us by leading attorneys of the state.

Proceedings
after deter-
mination of
issue of law.

SEC. 635. On a judgment for the plaintiff upon an issue of law, he may proceed in the manner prescribed by the first two subdivisions of section five hundred and eighty-five, upon the failure of the defendant to answer. If judgment be for the defendant upon an issue of law, and the taking of an account or the proof of any fact be necessary to enable the court to complete the judgment, a reference may be ordered as in that section provided.

NORM.—Substituted for section 181 of the practice act.

CHAPTER VI.

OF REFERENCES AND TRIALS BY REFEREES.

SECTION 638. Reference ordered upon agreement of parties, in what cases.

639. Reference ordered on motion, in what cases.

640. Number of referees, qualifications, etc.

641. Either party may object. Grounds of objection.

642. Objections, how disposed of.

643. Referees to report within ten days. Effect of. How excepted to, etc.

Reference
ordered upon
agreement of
parties, in
what cases.

SEC. 638. (§ 182.) A reference may be ordered upon the agreement of the parties filed with the clerk or entered in the minutes :

1. To try any or all of the issues in an action or proceeding, whether of fact or of law, and to report a finding and judgment thereon.

2. To ascertain a fact necessary to enable the court to determine an action or proceeding.

Reference
ordered on
motion, in
what cases.

SEC. 639. (§ 183.) When the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference in the following cases :

1. When the trial of an issue of fact requires the examination of a long account on either side ; in which case the referees may be directed to hear and decide the whole issue, or report upon any specific question of fact involved therein.

2. When the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect.

3. When a question of fact, other than upon the pleadings, arises upon motion or otherwise, in any stage of the action.

4. When it is necessary for the information of the court in a special proceeding.

SEC. 640. (§ 184.) A reference may be ordered to any person or persons, not exceeding three, agreed upon by the parties. If the parties do not agree, the court or judge must appoint one or more referees, not exceeding three, who reside in the county in which the action or proceeding is triable and against whom there is no legal objection, or the reference may be made to a court commissioner of the county where the cause is pending.

Number of
referees,
qualifica-
tions, etc.

SEC. 641. (§ 185.) Either party may object to the appointment of any person as referee, on one or more of the following grounds :

Either party
may object.

1. A want of any of the qualifications prescribed by statute to render a person competent as a juror.

Grounds of
objection.

2. Consanguinity or affinity, within the third degree, to either party.

3. Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal and agent, to either party ; or being a member of the family of either party ; or a partner in business with either party ; or being security on any bond or obligation for either party.

4. Having served as a juror or been a witness on any trial between the same parties, for the same cause of action.

5. Interest on the part of such person in the event of the action, or in the main question involved in the action.

6. Having formed or expressed an unqualified opinion or belief as to the merits of the action.

7. The existence of a state of mind in such person evincing enmity against or bias to either party.

Objections,
how disposed
of.

SEC. 642. (§ 186.) The objections taken to the appointment of any person as referee must be heard and disposed of by the court. Affidavits may be read and witnesses examined as to such objections.

Referees to
report with-
in ten days.

SEC. 643. (§ 187.) The referees or commissioner must report their findings in writing to the court within twenty days after the testimony is closed, and the facts found and conclusions of law must be separately stated therein.

Effect of.

The finding of the referee or commissioner upon the whole issue must stand as the finding of the court, and upon filing of the finding with the clerk of the court, judgment may be entered thereon in the same manner as if the action had been tried by the court. The finding of the referees or commissioner may be excepted to and reviewed in like manner as if made by the court. When the reference is to report the facts, the finding reported has the effect of a special verdict.

How except-
ed to, etc.

CHAPTER VII.

PROVISIONS RELATING TO TRIALS IN GENERAL.

ARTICLE I. EXCEPTIONS.

II. NEW TRIALS.

ARTICLE I.

EXCEPTIONS.

SECTION 646. Exceptions may be taken. Time when taken, etc.

647. What deemed excepted to.

648. Exception, form of.

649. Exceptions signed by judge and filed with clerk.

650. Exceptions not presented at time of ruling. Notice to adverse party, how settled upon, etc.

651. Exceptions after judgment, etc.

652. When exception is refused, application to supreme court to prove the same, etc.

Sec. 646. Exceptions may be taken by either party to any ruling or decision made by a court or judge, either before or after judgment, in any action or proceeding, and except in the cases provided for in the next section, must be taken at the time the ruling is made.

Exceptions
may be taken

Time when
taken, etc.

Sec. 647. The adverse party is deemed to have excepted to the verdict of the jury, or the final decision of the court or referee, to an order granting or refusing a new trial, sustaining or overruling a demurrer, striking out a pleading or any part thereof, granting or refusing a continuance, granting or refusing to change the place of trial, and to every order, ruling or proceeding made or had in the action or proceeding, either before or after judgment, upon an ex parte application.

What
deemed ex-
cepted to.

Sec. 648. (§ 190.) No particular form of exception is required. The objection must be stated, with so much of the evidence or other matter as is necessary to explain it, and no more. But when the exception is to the verdict or decision, upon the grounds of the insufficiency of the evidence to sustain it, the objection must specify the particulars in which such evidence is alleged to be insufficient.

Exception,
form of.

Sec. 649. A bill containing the exception to any ruling may be presented to the judge at the time the ruling is made. It must be conformable to the truth, or be at the time corrected until it is so, and signed by the judge and filed with the clerk.

Exceptions
signed by
judge and
filed with
clerk.

Sec. 650. If a bill is not presented at the time of the ruling, a bill containing the exceptions, or any of them, relating to any ruling had up to the time of the entry of judgment, may, upon one day's notice to the adverse party, at any time after such ruling is made and within thirty days after the entry of judgment, be presented to the judge and settled, as provided in the preceding section.

Exceptions
not present-
ed at time of
ruling.

Notice to ad-
verse party,
how settled
upon, etc.

Sec. 651. A bill containing the exceptions to any ruling made after judgment, except to a ruling made granting or refusing a new trial, may be presented to the judge at the time of such ruling and be settled as provided in section six hundred and forty-nine; and, if not so presented, may, upon one day's notice, and at any time after and

Exceptions
after judg-
ment, etc.

within ten days of such ruling, be presented and settled as in such section provided.

When exception is refused, application to supreme court to prove the same, etc.

SEC. 652. If the judge in any case refuse to allow an exception in accordance with the facts, or ceases to hold office before the bill is tendered or settled, the party desiring the bill settled may apply by petition to the supreme court to prove the same; the application may be made in the mode and manner, and under such regulations as that court may prescribe; and the bill, when proven, must be certified by the chief justice as correct and filed with the clerk of the court in which the action was tried, and when so filed it has the same force and effect as if settled by the judge who tried the cause.

NOTE.—See note to article 2.

ARTICLE II.

NEW TRIALS.

SECTION 656. New trial defined.

657. When a new trial may be granted.

658. On what papers moved for.

659. Notice of motion, upon whom served and what to contain.

660. Motion to be heard at the time specified, or dismissed.

661. Judge to make statement on decision of the motion. This statement to constitute bill of exception.

New trial defined.

SEC. 656. (§ 192.) A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury or court, or by referees.

When a new trial may be granted.

SEC. 657. (§ 193.) The former verdict or other decision may be vacated and a new trial granted, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:

1. Irregularity in the proceedings of the court, jury or adverse party, or for any abuse of discretion, by which either party was prevented from having a fair trial.

2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors.

3. Accident or surprise, which ordinary prudence could not have guarded against.

4. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

5. Excessive damages, appearing to have been given under the influence of passion or prejudice.

6. Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

7. Error in law, occurring at the trial and excepted to by the party making the application.

Sec. 658. When the application is made for a cause mentioned in the fifth, sixth and seventh subdivisions of the last section, it is made upon bills of exception on file; for any other cause it is made upon affidavit. If the application is made upon affidavits, the affidavits of the moving party must be filed with the clerk and served upon the adverse party, within twenty-five days after the verdict or decision is made. The adverse party may file counter affidavits within five days thereafter, and, upon leave of the court or judge, the moving party may within five days file affidavits in rebuttal.

On what
papers
moved for.

Sec. 659. The party intending to move for a new trial must, within thirty days after the decision or verdict, file with the clerk and serve upon the adverse party a notice of his intention, designating therein generally the grounds upon which the motion will be made, and the time and place at which it will be brought on for hearing. The time designated must be not less than ten nor more than twenty days after service of the notice.

Notice of
motion, upon
whom served
and what to
contain.

Sec. 660. At the time specified in the notice, or at such other time as the court or judge may adjourn the hearing to, not exceeding ten days, the motion must be heard. If the moving party fail to appear at either time it must be dismissed, and the case will stand as though no motion had ever been noticed or made. If heard by the court or judge, it must be decided within ten days after the hearing.

Motion to be
heard at the
time speci-
fied, or
dismissed.

Judge to
make state-
ment on de-
cision of the
motion.

Sec. 661. The court or judge deciding the motion must immediately thereafter file with the clerk of the court a statement in writing, under his hand, containing—

1. The name of the court and title of the cause.
2. A reference to all pleadings, papers, bills of exception and affidavits used on the motion.
3. A statement that the pleadings, etc., so referred to are made part of the statement.
4. The decision of the court on the motion.
5. The grounds upon which the decision rests.
6. A statement that the party against whom the decision is rendered excepts to the decision.

This state-
ment to con-
stitute bill of
exception.

And the statement so made and filed constitutes and has all the force and effect of a bill of exception to the order granting or refusing the motion.

NOTE.—Articles 1 and 2 are a substitute for the provisions of our practice act relating to exceptions and motions for new trials. For all the statements and counter statements and complicated machinery, we have substituted a simple practice by bills of exception. Under the present system nearly one-third of the time of sessions of the supreme court is devoted to hearing arguments addressed, not to the merits of the case, but as to whether the merits are before the court. We now have in our reports more decisions on points of practice, relative to that question, than can be found in the reports of the supreme court of the United States from its organization. By allowing an exception to be taken to the verdict or decision, we avoid, in eight cases out of ten, a resort to a motion for a new trial, and allow the question of sufficiency of the evidence to come directly to the supreme court *as a question of law*, as in criminal cases, thus leaving the motion for new trial, in most cases, but one office to perform—that of giving the court below an opportunity to review its own decision. If the new trial is moved for, then the papers used at the hearing are, by the judge, turned into a bill of exception and constitute the only record on appeal from a decision granting or refusing the motion. By a provision already recommended by us, the judge must decide every cause submitted to him within twenty days after its submission. We dispense with notice of filing of findings, but the party knows that they must be filed within twenty days, and the only diligence we put him to is to inquire at the end of that time, for if the findings are filed the next day after the cause was submitted, he will still have left eleven days of his thirty in which to move for a new trial. At the end of thirty days all affidavits and matters, upon which the motion for new trial is based, must be filed, and the motion must be brought on in not exceeding twenty days. Thus we have a system that gives to

every one ample time, and in which, if the utmost limit is taken in each step, requires the case to be decided, and motion for new trial disposed of, within eighty days after the trial of the cause. Neither party could, by any means, delay a final decision, so far as the district court is concerned, beyond that time. Under the present system either party can ordinarily delay each step in the proceeding for a greater period than eighty days.

CHAPTER VIII.

THE MANNER OF GIVING AND ENTERING JUDGMENT.

SECTION 664. Judgment to be entered in twenty-four hours, etc.

665. Case may be brought before the court for argument.

666. When counter claim established exceeds plaintiff's demand.

667. In replevin, judgment to be in the alternative, and with damages. Gold coin or currency judgment.

668. Judgment book to be kept by the clerk.

669. If a party die after verdict, judgment may be entered, but not to be a lien.

670. Judgment roll, what to constitute.

671. Judgment lien, when it begins and when it expires.

672. Docket, how kept, and what to contain.

673. Docket to be open for inspection without charge.

674. Transcript to be filed in any county, and judgment to become a lien there.

675. Satisfaction of a judgment, how made.

SEC. 664. (§ 197.) When trial by jury has been had, judgment must be entered by the clerk, in conformity to the verdict, within twenty-four hours after the rendition of the verdict, unless the court order the case to be reserved for argument or further consideration, or grant a stay of proceedings.

Judgment to be entered in twenty-four hours, etc.

SEC. 665. (§ 198.) When the case is reserved for argument or further consideration, as mentioned in the last section, it may be brought by either party before the court for argument.

Case may be brought before the court for argument.

SEC. 666. (§ 199.) If a counter claim, established at the trial, exceed the plaintiff's demand, judgment for the defendant must be given for the excess; or if it appear that the defendant is entitled to any other affirmative relief, judgment must be given accordingly.

When counter claim established exceeds plaintiff's demand.

In replevin,
judgment to
be in the
alternative,
and with
damages.

SEC. 667. (§ 200.) In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or the value thereof, in case a delivery cannot be had, and damages for the detention. If the property has been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property or the value thereof, in case a return cannot be had, and damages for taking and withholding the same. In an action on a contract or obligation in writing, for the direct payment of money, made payable in a specified kind of money or currency, judgment for the plaintiff, whether it be by default or after verdict, may follow the contract or obligation, and be made payable in the kind of money or currency specified therein; and in all actions for the recovery of money, if the plaintiff allege in his complaint that the same was understood and agreed by the respective parties to be payable in a specified kind of money or currency, and this fact is admitted by the default of the defendant or established by evidence, the judgment for the plaintiff must be made payable in the kind of money or currency so alleged in the complaint; and in an action against any person for the recovery of money received by such person in a fiduciary capacity, or to the use of another, judgment for the plaintiff must be made payable in the kind of money or currency so received by such person.

Gold coin or
currency
judgment.

Judgment
book to be
kept by the
clerk.

SEC. 668. (§ 201.) The clerk must keep, with the records of the court, a book to be called the "judgment book," in which judgments must be entered.

If a party die
after verdict,
judgment
may be en-
tered, but
not to be a
lien.

SEC. 669. (§ 202.) If a party die after a verdict or decision upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon. Such judgment is not a lien on the real property of the deceased party, but is payable in the course of administration on his estate.

Judgment
roll, what to
constitute.

SEC. 670. (§ 203.) Immediately after entering the judgment, the clerk must attach together and file the following papers, which constitute the judgment roll:

1. In case the complaint be not answered by any defendant, the summons, with the affidavit or proof of ser-

vice, and the complaint, with a memorandum indorsed upon the complaint that the default of the defendant in not answering was entered, and a copy of the judgment.

2. In all other cases, the summons, proof of service, pleadings, verdict of the jury or finding of the court, commissioner or referee, all bills of exception taken and filed, copies of orders sustaining or overruling demurrers, a copy of the judgment, and copies of any orders relating to a change of parties.

SEC. 671. (§ 204.) Immediately after filing a judgment roll, the clerk must make the proper entries of the judgment, under appropriate heads, in the docket kept by him; and from the time the judgment is docketed it becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in the county, owned by him at the time or which he may afterwards acquire, until the lien expires. The lien continues for two years, unless the judgment be previously satisfied.

Judgment
lien, when it
begins and
when it
expires.

SEC. 672. (§ 205.) The docket mentioned in the last section is a book which the clerk keeps in his office, with each page divided into eight columns, and headed as follows: judgment debtors; judgment creditors; judgment: time of entry; where entered in judgment book; appeals: when taken; judgment of appellate court; satisfaction of judgment, when entered. If judgment be for the recovery of money or damages, the amount must be stated in the docket under the head of judgment; if the judgment be for any other relief, a memorandum of the general character of the relief granted must be stated. The names of the defendants must be entered in alphabetical order.

Docket, how
kept, and
what to con-
tain.

SEC. 673. (§ 206.) The docket kept by the clerk is open at all times, during office hours, for the inspection of the public, without charge. The clerk must arrange the several dockets kept by him in such a manner as to facilitate their inspection.

Docket to
be open for
inspection
without
charge.

SEC. 674. (§ 207.) A transcript of the original docket, certified by the clerk, may be filed with the recorder of any other county, and from the time of the filing, the judgment becomes a lien upon all the real property of the

Transcript
to be filed in
any county,
and judg-
ment to be-
come a lien
there.

judgment debtor, not exempt from execution, in such county, owned by him at the time or which he may afterwards, and before the lien expires, acquire. The lien continues for two years, unless the judgment be previously satisfied.

Satisfaction
of a judgment,
how made.

SEC. 675. (§ 208.) Satisfaction of a judgment may be entered in the clerk's docket upon an execution returned satisfied, or upon an acknowledgment of satisfaction filed with the clerk, made in the manner of an acknowledgment of a conveyance of real property, by the judgment creditor; or within one year after the judgment by the attorney, unless a revocation of his authority be previously filed. Whenever a judgment is satisfied in fact, otherwise than upon an execution, the party or attorney must give such acknowledgment, and, upon motion, the court may compel it or may order the entry of satisfaction to be made without it.

TITLE IX.

OF THE EXECUTION OF THE JUDGMENT IN CIVIL ACTIONS.

CHAPTER I. *The execution.*

II. *Proceedings supplemental to the execution.*

CHAPTER I.

THE EXECUTION.

SECTION 680. Within what time execution may issue.

681. Who may issue the execution, its form, to whom directed and what it shall require.

682. When all the defendants were not served with summons, what to direct.

683. When made returnable.

684. Money judgments and others, how enforced.

685. Execution after five years.

686. When execution may issue against the property of a party after his death.

687. Execution, how and to whom issued.

688. What shall be liable to be seized in execution. Not to be affected till a levy is made.

SECTION 689. When property is claimed by a third party, how the right of property is tried.

690. What exempt from execution.

691. Writ, how executed.

692. Notice of sale under execution, how given.

693. Selling without notice, what penalty attached.

694. Sales, how conducted. Neither the officer conducting it nor his deputy to be a purchaser. Real and personal property how sold. Judgment debtor, if present, may direct order of sale and the officer shall follow his directions.

695. If purchaser refuses to pay purchase money, what proceedings.

696. Court of justice may proceed in a summary manner against a purchaser refusing to pay. Officer may refuse such purchaser's bid after.

697. These two sections not to make officer liable beyond a certain amount.

698. Personal property not capable of manual delivery, how delivered to purchaser.

699. Personal property not capable of manual delivery, how sold and delivered.

700. Real property, when absolute sale or not. In the latter case, what the certificate must contain.

701. Real property so sold, by whom it may be redeemed.

702. When it may be redeemed, and redemption money.

703. When judgment debtor or other redemptioner may redeem.

704. In cases of redemption, to whom the judgments are to be made.

705. What a redemptioner must do in order to redeem.

706. Until the expiration of redemption time court may restrain waste on the property. What considered waste.

707. Rents and profits.

708. If purchaser of real property be evicted for irregularities in sale, what he may recover and from whom. When judgment to be revived. Petition for the purpose, how and by whom made.

709. Party who pays more than his share may compel contribution.

SEC. 680. (§ 209.) The party in whose favor judgment is given, may, at any time within five years after the entry thereof, have issued a writ of execution for its enforcement.

Within what time execution may issue.

SEC. 681. (§ 210.) The writ of execution must be issued in the name of the people, sealed with the seal of the court, and subscribed by the clerk, and be directed to the sheriff, and it must intelligibly refer to the judgment, stating the court, the county where the judgment roll is filed, and if it be for money, the amount thereof, and the amount actually due thereon, and if made payable in a specified kind of money or currency, as provided in sec-

Who may issue the execution, its form, to whom directed and what it shall require.

Who may issue the execution, its form, to whom directed, and what it shall require.

tion six hundred and sixty-seven, the execution must also state the kind of money or currency in which the judgment is payable, and must require the sheriff, substantially as follows :

1. If it be against the property of the judgment debtor, it must require the sheriff to satisfy the judgment, with interest, out of the personal property of such debtor, and if sufficient personal property cannot be found, then out of his real property ; or if the judgment be a lien upon real property, then out of the real property belonging to him on the day when the judgment was docketed, or at any time thereafter ; or if the execution be issued to a county other than the one in which the judgment was recovered, on the day when the transcript of the docket was filed in the office of the recorder of such county, stating such day, or any time thereafter.

2. If it be against real or personal property in the hands of the personal representatives, heirs, devisees, legatees, tenants or trustees, it must require the sheriff to satisfy the judgment, with interest, out of such property.

3. If it be against the person of the judgment debtor, it must require the sheriff to arrest such debtor and commit him to the jail of the county until he pay the judgment, with interest, or be discharged according to law.

4. If it be issued on a judgment made payable in a specified kind of money or currency, as provided in section six hundred and sixty-seven, it must also require the sheriff to satisfy the same in the kind of money or currency in which the judgment is made payable, and the sheriff must refuse payment in any other kind of money or currency ; and in case of levy and sale of the property of the judgment debtor he must refuse payment from any purchaser at such sale in any other kind of money or currency than that specified in the execution. The sheriff collecting money or currency in the manner required by this chapter, must pay to the plaintiff or party entitled to recover the same, the same kind of money or currency received by him, and in case of neglect or refusal so to do, he shall be liable on his official bond to the judgment creditor in three times the amount of the money so collected.

5. If it be for the delivery of the possession of real or personal property, it must require the sheriff to deliver the possession of the same, particularly describing it, to

the party entitled thereto, and may, at the same time, require the sheriff to satisfy any costs, damages, rents or profits, recovered by the same judgment, out of the personal property of the person against whom it was rendered, and the value of the property for which the judgment was rendered to be specified therein if a delivery thereof cannot be had; and if sufficient personal property cannot be found, then out of the real property, as provided in the first subdivision of this section

Sec. 682. (§ 211.) When a writ of execution is issued on a judgment recovered against two or more persons, in an action upon a joint contract, in which action all the defendants were not served with summons, or did not appear, it must direct the sheriff to satisfy the judgment out of the joint property of all the defendants, and the individual property only of the defendants who were served or who appeared in the action. In other respects, the writ must contain the directions specified in subdivisions one and four of the last section.

When all the defendants were not served with summons, what to direct.

Sec. 683. (§ 212.) The execution may be made returnable, at any time not less than ten nor more than sixty days after its receipt by the sheriff, to the clerk with whom the judgment roll is filed. When the execution is returned, the clerk must attach it to the judgment roll. If any real estate be levied upon, the clerk must record the execution and the return thereto at large, and certify the same under his hand as true copies, in a book to be called the "execution book," which book must be indexed with the names of the plaintiffs and defendants in execution alphabetically arranged, and kept open at all times during office hours for the inspection of the public, without charge. It is evidence of the contents of the originals whenever they or any part thereof may be destroyed or mutilated.

When made returnable.

Sec. 684. (§ 213.) Where the judgment requires the payment of money or the delivery of real or personal property, the same may be enforced by a writ of execution; when it requires the performance of any other act, a certified copy of the judgment may be served upon the

Money judgments and others, how enforced.

party against whom the same is rendered, or upon the person or officer required thereby or by law to obey the same; obedience thereto may be enforced by the court, and after a final judgment of partition the court has power to enforce a severance of the possession.

Execution
after five
years.

SEC. 685. (§ 214.) In all cases, other than for the recovery of money, the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, or by judgment for that purpose, founded upon supplemental pleadings.

When exe-
cution may
issue against
the property
of a party af-
ter his death.

SEC. 686. (§ 215.) Notwithstanding the death of a party after the judgment, execution thereon may be issued, as follows :

1. In case of the death of the plaintiff, upon the application of his executor or administrator, or successor in interest, by the court in which the judgment was rendered or exists.

2. In case of the death of the defendant, if the judgment be for the recovery of real or personal property, execution may be issued and executed against the property.

Execution,
how and to
whom issued

SEC. 687. (§ 216.) Where the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county in the state. Where it requires the delivery of real or personal property, it must be issued to the sheriff of the county where the property, or some part thereof, is situated. Executions may be issued, at the same time, to different counties.

What shall
be liable to
be seized in
execution.

SEC. 688. (§ 217.) All goods, chattels, moneys and other property, both real and personal, or any interest therein of the judgment debtor, not exempt by law, and all property and rights of property, seized and held under attachment in the action, are liable to execution. Shares and interests in any corporation or company, and debts and credits and all other property, both real and personal, or any interest in either real or personal property, and all other property not capable of manual delivery, may be attached on execution, in like manner as upon writs of attachments. Gold dust must be returned by the officer

as so much money collected, at its current value, without exposing the same to sale. Until a levy, property is not affected by the execution.

Not to be affected till levy is made.

Sec. 689. (§ 218.) If the property levied on be claimed by a third person as his property, the sheriff must summon from his county six persons qualified as jurors, between the parties, to try the validity of the claim. He must also give notice of the claim and of the time of trial to the plaintiff, who may appear and contest the claim before the jury. The jury and the witnesses must be sworn by the sheriff, and if their verdict be in favor of the claimant, the sheriff may relinquish the levy, unless the judgment creditor give him a sufficient indemnity for proceeding thereon. The fees of the jury, the sheriff and the witnesses must be paid by the claimant if the verdict be against him; otherwise, by the plaintiff.

When property is claimed by a third party, how the right of property is tried.

Sec. 690. (§ 219.) The following property is exempt from execution, except as herein otherwise specially provided:

What exempt from execution.

1. Chairs, tables, desks and books, to the value of two hundred dollars, belonging to the judgment debtor.

2. Necessary household, table and kitchen furniture belonging to the judgment debtor, including one sewing machine and one piano, in actual use, in a family, or belonging to a woman; stoves, stove-pipe and stove furniture, wearing apparel, beds, bedding and bedsteads, and provisions, actually provided for individual or family use, sufficient for one month.

3 The farming utensils or implements of husbandry of the judgment debtor; also, two oxen, or two horses or two mules, and their harness, four cows with their sucking calves, one cart or wagon, and food for such oxen, horses, cows or mules, for one month; also, all seed grain or vegetables actually provided, reserved or on hand, for the purpose of planting or sowing at any time within the ensuing six months, not exceeding in value the sum of two hundred dollars.

4. Tools or implements of a mechanic or artisan necessary to carry on his trade; the notarial seal and records of a notary public; the instruments and chest of a surgeon, physician, surveyor and dentist, necessary to the

What ex-
empt from
execution.

exercise of their profession, with their scientific and professional libraries; the law professional libraries and office furniture of attorneys, counsellors and judges, and the libraries of ministers of the gospel.

5. The cabin or dwelling of a miner, not exceeding in value the sum of five hundred dollars; also, his sluices, pipes, hose, windlass, derrick, cars, pumps, tools, implements and appliances necessary for carrying on any kind of mining operations, not exceeding in value the aggregate sum of five hundred dollars; and two horses, mules or oxen, with their harness; and food for such horses, mules or oxen, for one month, when necessary to be used in any whim, windlass, derrick, car, pump or hoisting gear.

6. Two oxen, two horses or two mules, and their harness; and one cart or wagon, one dray or truck, one coupee, one hack or carriage for one or two horses, by the use of which a cartman, drayman, truckman, huckster, pedler, hackman, teamster or other laborer, habitually earns his living; and one horse, with vehicle and harness, or other equipments used by a physician, surgeon or minister of the gospel, in making his professional visits, with food for such oxen, horses or mules, for one month.

7. All fire-engines, hooks and ladders, with the carts, trucks and carriages, hose, buckets, implements and apparatus thereto appertaining, and all furniture and uniforms of any fire company or department organized under any law of this state.

8. All arms, uniforms and accoutrements required by law to be kept by any person.

9. All court-houses, jails, public offices and buildings, lots, grounds and personal property, the fixtures, furniture, books, papers and appurtenances belonging and pertaining to the court-house, jail and public offices, belonging to any county of this state; and all cemeteries, public squares, parks and places, public buildings, town halls, markets, buildings for the use of fire departments and military organizations, and the lots and grounds thereto belonging and appertaining, owned or held by any town or incorporated city, or dedicated by such town or city to health, ornament or public use, or for the use of any fire or military company organized under the

laws of this state; but no article or species of property mentioned in this section is exempt from execution issued upon a judgment recovered for its price or upon a mortgage thereon.

10. The earnings of the judgment debtor for his personal services rendered at any time within thirty days next preceding the levy of execution or levy of attachment, when it appears, by the debtor's affidavit or otherwise, that such earnings are necessary for the use of his family residing in this state, supported wholly or in part by his labor.

11. The shares held by a member of a homestead association duly incorporated, not exceeding in value one thousand dollars—if the person holding the share is not the owner of a homestead under the laws of this state.

12. All moneys, benefits, privileges or immunities accruing, or in any manner growing out of any life insurance on the life of the debtor, made in any company incorporated under the laws of this state, if the annual premiums paid do not exceed five hundred dollars.

Statutes of 1866, p. 271; 1861, p. 567; 1862, p. 444; 1868, p. 500.

SEC. 691. (§ 220.) The sheriff must execute the writ against the property of the judgment debtor, by levying on a sufficient amount of property, if there be sufficient; collecting or selling the things in action, and selling the other property, and paying to the plaintiff or his attorney so much of the proceeds as will satisfy the judgment or depositing the amount with the clerk of the court; any excess in the proceeds over the judgment and the sheriff's fees must be returned to the judgment debtor. When there is more property of the judgment debtor than is sufficient to satisfy the judgment and the sheriff's fees, within the view of the sheriff, he must levy only on such part of the property as the judgment debtor may indicate.

Writ, how
executed.

SEC. 692. (§ 221.) Before the sale of property on execution, notice thereof must be given, as follows:

Notice of sale
under execu-
tion, how
given.

1. In case of perishable property: by posting written notice of the time and place of sale in three public places of the township or city where the sale is to take place,

for such time as may be reasonable, considering the character and condition of the property.

2. In case of other personal property: by posting a similar notice in three public places in the township or city where the sale is to take place, not less than five nor more than ten days successively.

3. In case of real property: by posting a similar notice, particularly describing the property, for twenty days successively, in three public places of the township or city where the property is situated, and also when the property is to be sold, and publishing a copy thereof, once a week for the same period, in some newspaper published in the county, if there be one.

4. When the judgment under which the property is to be sold is made payable in a specified kind of money or currency, the several notices required by this section must state the kind of money or currency in which bids may be made at such sale, which must be the same as that specified in the judgment.

Selling without notice, what penalty attached.

SEC. 693. (§ 222.) An officer selling without the notice prescribed by the last section forfeits five hundred dollars to the aggrieved party, in addition to his actual damages; and a person wilfully taking down or defacing the notice posted, if done before the sale or the satisfaction of the judgment (if the judgment be satisfied before sale), forfeits five hundred dollars.

Sales, how conducted.

SEC. 694. (§ 223.) All sales of property under execution must be made at auction to the highest bidder, between the hours of nine in the morning and five in the afternoon. After sufficient property has been sold to satisfy the execution, no more can be sold. Neither the officer holding the execution nor his deputy can become a purchaser or be interested in any purchase at such sale. When the sale is of personal property, capable of manual delivery, it must be within view of those who attend the sale, and be sold in such parcels as are likely to bring the highest price; and when the sale is of real property, consisting of several known lots or parcels, they must be sold separately; or when a portion of such real property is claimed by a third person, and he requires it to be sold separately, such portion must be thus sold. The judg-

Neither the officer conducting it nor his deputy to be a purchaser. Real and personal property, how sold.

ment debtor, if present at the sale, may also direct the order in which property, real or personal, shall be sold, when such property consists of several known lots or parcels, or of articles which can be sold to advantage separately, and the sheriff must follow such directions.

Judgment debtor, if present, may direct order of sale and the officer shall follow his directions.

Sec. 695. (§ 224.) If a purchaser refuse to pay the amount bid by him for property struck off to him at a sale under execution, the officer may again sell the property at any time to the highest bidder, and if any loss be occasioned thereby, the officer may recover the amount of such loss, with costs, by motion, upon previous notice of five days before any court, or before any justice of the peace, if the same does not exceed his jurisdiction.

If purchaser refuses to pay purchase money, what proceedings.

Sec. 696. (§ 225.) Such court of justice must proceed in a summary manner and give judgment, and issue execution therefor forthwith, but the defendant may claim a jury; and the same proceedings may be had against any subsequent purchaser who refuses to pay, and the officer may, in his discretion, thereafter reject the bid of any person so refusing.

Court of justice may proceed in a summary manner against a purchaser refusing to pay. Officer may refuse such purchaser's bid after.

Sec. 697. (§ 226.) The two preceding sections must not be construed to make the officer liable for any more than the amount bid by the second or subsequent purchaser, and the amount collected from the purchaser refusing to pay.

These two sections not to make officer liable beyond a certain amount.

Sec. 698. (§ 227.) When the purchaser of any personal property capable of manual delivery pays the purchase money, the officer making the sale must deliver to the purchaser the property, and, if desired, execute and deliver to him a certificate of the sale. Such certificate conveys to the purchaser all the right which the debtor had in such property on the day the execution was levied.

Personal property capable of manual delivery, how delivered to purchaser.

Sec. 699. (§ 228.) When the purchaser of any personal property not capable of manual delivery pays the purchase money, the officer making the sale must execute and deliver to the purchaser a certificate of sale. Such certificate conveys to the purchaser all the right which the debtor had in such property on the day the execution was levied.

Personal property not capable of manual delivery. how sold and delivered.

Real prop-
erty, when
absolute sale
or not.

In the latter
case, what
the certifi-
cate must
contain.

SEC. 700. (§ 229.) Upon a sale of real property, the purchaser is substituted to and acquires all the right, title, interest and claim of the judgment debtor thereto; and when the estate is less than a leasehold of two years' unexpired term, the sale is absolute. In all other cases, the property is subject to redemption, as provided in this chapter. The officer must give to the purchaser a certificate of sale, containing—

1. A particular description of the real property sold.
2. The price bid for each distinct lot or parcel.
3. The whole price paid.
4. When subject to redemption, it must be so stated.

And when the judgment, under which the sale has been made, is made payable in a specified kind of money or currency, the certificate must also show the kind of money or currency in which such redemption may be made, which must be the same as that specified in the judgment. A duplicate of such certificate must be filed by the officer in the office of the recorder of the county.

Real prop-
erty so sold,
by whom it
may be re-
deemed.

SEC. 701. (§ 230.) Property sold subject to redemption, as provided in the last section, or any part sold separately, may be redeemed in the manner hereinafter provided, by the following persons, or their successors in interest:

1. The judgment debtor, or his successor in interest, in the whole or any part of the property.
2. A creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. The persons mentioned in the second subdivision of this section are, in this chapter, termed redemptioners.

When it may
be redeemed
and redemp-
tion money.

SEC. 702. (§ 231.) The judgment debtor or redemptioner may redeem the property from the purchaser within six months after the sale, on paying the purchaser the amount of his purchase, with twelve per cent. thereon in addition, together with the amount of any assessment or taxes which the purchaser may have paid thereon after the purchase, and interest on such amount; and if the purchaser be also a creditor having a prior lien to that of the redemptioner, other than the judgment under which such purchase was made, the amount of such lien, with interest.

Sec. 703. (§ 232.) If property be so redeemed by a redemptioner, either the judgment debtor or another redemptioner may, within sixty days after the last redemption, again redeem it from the last redemptioner, on paying the sum paid on such last redemption, with four per cent. thereon in addition, and the amount of any assessment or taxes which the last redemptioner may have paid thereon after the redemption by him, with interest on such amount, and in addition the amount of any liens held by said last redemptioner prior to his own, with interest; the judgment under which the property was sold need not be so paid as a lien. The property may be again, and as often as the debtor or a redemptioner is so disposed, redeemed from any previous redemptioner, within sixty days after the last redemption, with four per cent. thereon in addition, and the amount of any assessments or taxes which the last previous redemptioner paid after the redemption by him, with interest thereon, and the amount of any liens, other than the judgment under which the property was sold, held by the last redemptioner previous to his own, with interest. Notice of redemption must be given to the sheriff. If no redemption be made within six months after the sale, the purchaser, or his assignee, is entitled to a conveyance; or, if so redeemed, whenever sixty days have elapsed, and no other redemption has been made, and notice thereof given, and the time for redemption has expired, the last redemptioner, or his assignee, is entitled to a sheriff's deed. If the debtor redeem at any time before the time for redemption expires, the effect of the sale is terminated and he is restored to his estate.

When judgment debtor or other redemptioner may redeem.

Sec. 704. (§ 233.) The payments mentioned in the last two sections may be made to the purchaser or redemptioner, or for him, to the officer who made the sale. When the judgment under which the sale has been made is payable in a specified kind of money or currency, payments must be made in the same kind of money or currency, and a tender of the money is equivalent to payment.

In cases of redemption, to whom the payments are to be made.

Sec. 705. (§ 234.) A redemptioner must produce to the

What a redemptioner must do in order to redeem.

officer or person, from whom he seeks to redeem, and serve with his notice to the sheriff—

1. A copy of the docket of the judgment under which he claims the right to redeem, certified by the clerk of the court, or of the county where the judgment is docketed, or if he redeems upon a mortgage or other lien, a note of the record thereof, certified by the recorder.

2. A copy of any assignment necessary to establish his claim, verified by the affidavit of himself, or of a subscribing witness thereto.

3. An affidavit by himself or his agent, showing the amount then actually due on the lien.

Until the expiration of redemption time court may restrain waste on the property.

What not considered waste.

SEC. 706. (§ 235.) Until the expiration of the time allowed for redemption, the court may restrain the commission of waste on the property, by order granted with or without notice, on the application of the purchaser or the judgment creditor. But it is not waste for the person in possession of the property at the time of sale, or entitled to possession afterwards, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used; or to use in the ordinary course of husbandry; or to make the necessary repairs of buildings thereon; or to use wood or timber on the property therefor; or for the repair of fences; or for fuel in his family, while he occupies the property.

Rents and profits.

SEC. 707. (§ 236.) The purchaser, from the time of the sale until a redemption, and a redemptioner, from the time of his redemption until another redemption, is entitled to receive, from the tenant in possession, the rents of the property sold, or the value of the use and occupation thereof. But when any rents or profits have been received by the judgment creditor or purchaser, or his or their assigns, from the property thus sold preceding such redemption, the amounts of such rents and profits shall be a credit upon the redemption money to be paid; and if the redemptioner or judgment debtor, before the expiration of the time allowed for such redemption, demands in writing of such purchaser or creditor, or his assigns, a written and verified statement of the amounts of such rents and profits thus received, the period for redemption is extended five days after such sworn statement is given

by such purchaser or his assigns, to such redemptioner or debtor. If such purchaser or his assigns shall, for a period of one month from and after such demand, fail or refuse to give such statement, such redemptioner or debtor may bring an action in any court of competent jurisdiction, to compel an accounting and disclosure of such rents and profits, and until fifteen days from and after the final determination of such action, the right of redemption is extended to such redemptioner or debtor.

SEC. 708. (§ 237.) If the purchaser of real property sold on execution, or his successor in interest, be evicted therefrom in consequence of irregularities in the proceedings concerning the sale, or of the reversal or discharge of the judgment, he may recover the price paid, with interest, from the judgment creditor. If the purchaser of property at sheriff's sale, or his successor in interest, fail to recover possession, in consequence of irregularity in the proceedings concerning the sale, or because the property sold was not subject to execution and sale, the court having jurisdiction thereof must, on petition of such party in interest, or his attorney, revive the original judgment in the name of the petitioner, for the amount paid by such purchaser at the sale, with interest thereon from the time of payment, at the same rate that the original judgment bore; and the judgment so revived has the same force and effect as would an original judgment of the date of the revival, and no more.

If purchaser of real property be evicted for irregularities in sale, what he may recover and from whom.

When judgment to be revived.

Petition for the purpose, how and by whom made.

SEC. 709. When property, liable to an execution against several persons, is sold thereon, and more than a due proportion of the judgment is satisfied out of the proceeds of the sale of the property of one of them, or one of them pays, without a sale, more than his proportion, he may compel contribution from the others; and when a judgment is against several, and is upon an obligation of one of them, as security for another, and the surety pays the amount, or any part thereof, either by sale of his property or before sale, he may compel repayment from the principal; in such case, the person so paying or contributing is entitled to the benefit of the judgment, to enforce contribution or repayment, if, within ten days after his payment, he file with the clerk of the court where the judg-

Party who pays more than his share may compel contribution.

ment was rendered, notice of his payment and claim to contribution or repayment. Upon a filing of such notice, the clerk must make an entry thereof in the margin of the docket.

NOTE.—Section 480 of the Kansas code of civil procedure.

CHAPTER II.

PROCEEDINGS SUPPLEMENTARY TO THE EXECUTION.

SECTION 714. Debtor required to answer concerning his property, when.

715. Proceedings to compel debtor to appear. In what cases he may be arrested. What bail may be given.

716. Any debtor of the judgment debtor may pay the latter's creditor.

717. Examination of debtors of judgment debtor, or of those having property belonging to him.

718. Witnesses required to testify.

719. Judge may order property to be applied on execution.

720. Proceedings upon claim of another party to property, or on denial of indebtedness to judgment debtor.

721. Disobedience of orders, how punished.

Debtor required to answer concerning his property, when.

SEC. 714. (§ 238.) When an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, issued to the sheriff of the county where he resides, or, if he do not reside in this state, to the sheriff of the county where the judgment roll is filed, is returned unsatisfied, in whole or in part, the judgment creditor, at any time after such return is made, is entitled to an order from the judge of the court, or a county judge, requiring such judgment debtor to appear and answer concerning his property, before such judge, or a referee appointed by him, at a time and place specified in the order; but no judgment debtor must be required to attend before a judge or referee out of the county in which he resides.

Proceedings to compel debtor to appear.

SEC. 715. (§ 239.) After the issuing of an execution against property, and upon proof by affidavit of a party or otherwise, to the satisfaction of the court, or of a judge thereof, or county judge, that any judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment, such court or judge may,

by an order, require the judgment debtor to appear at a specified time and place before such judge, or a referee appointed by him, to answer concerning the same; and such proceedings may thereupon be had for the application of the property of the judgment debtor toward the satisfaction of the judgment as are provided upon the return of an execution. Instead of the order requiring the attendance of the judgment debtor, the judge may, upon affidavit of the judgment creditor, his agent or attorney, if it appear to him that there is danger of the debtor absconding, order the sheriff to arrest the debtor and bring him before such judge. Upon being brought before the judge, he may be ordered to enter into an undertaking, with sufficient surety, that he will attend from time to time before the judge or referee, as may be directed, during the pendency of proceedings and until the final termination thereof, and will not in the meantime dispose of any portion of his property, not exempt from execution. In default of entering into such undertaking he may be committed to prison.

In what cases
he may be
arrested.

What bail
may be
given.

SEC. 716. (§ 240.) After the issuing of an execution against property, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as may be necessary to satisfy the execution; and the sheriff's receipt is a sufficient discharge for the amount so paid.

Any debtor
of the judg-
ment debtor
may pay the
latter's cred-
itor.

SEC. 717. (§ 241.) After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, or upon proof by affidavit or otherwise, to the satisfaction of the judge, that any person or corporation has property of such judgment debtor, or is indebted to him in an amount exceeding fifty dollars, the judge may, by an order, require such person or corporation, or any officer or member thereof, to appear at a specified time and place before him, or a referee appointed by him, and answer concerning the same.

Examination
of debtors of
judgment
debtor, or
of those hav-
ing property
belonging
to him.

SEC. 718. (§ 242.) Witnesses may be required to appear and testify before the judge or referee, upon any proceeding under this chapter, in the same manner as upon the trial of an issue.

Witnesses
required to
testify.

Judge may order property to be applied on execution.

SEC. 719. (§ 243.) The judge or referee may order any property of a judgment debtor, not exempt from execution, in the hands of such debtor or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment.

Proceedings upon claim of another party to property, or on denial of indebtedness to judgment debtor.

SEC. 720. (§ 244.) If it appear that a person or corporation, alleged to have property of the judgment debtor, or indebted to him, claims an interest in the property adverse to him, or denies the debt, the court or judge may authorize, by an order made to that effect, the judgment creditor to institute an action against such person or corporation for the recovery of such interest or debt; and the court or judge may, by order, forbid a transfer or other disposition of such interest or debt, until an action can be commenced and prosecuted to judgment. Such order may be modified or vacated by the judge granting the same, or the court in which the action is brought, at any time, upon such terms as may be just.

Disobedience of orders, how punished.

SEC. 721. (§ 245) If any person, party or witness disobey an order of the referee, properly made, in the proceedings before him under this chapter, he may be punished by the court or judge ordering the reference, for a contempt.

TITLE X.

ACTIONS IN PARTICULAR CASES.

CHAPTER I. *Actions for the foreclosure of mortgages.*

II. *Actions for nuisance, waste and wilful trespass, in certain cases, on real property.*

III. *Actions to determine conflicting claims to real property, and other provisions relating to actions concerning real estate.*

IV. *Actions for the partition of real property.*

V. *Actions for the usurpation of an office or franchise.*

VI. *Of actions against steamers, vessels and boats.*

CHAPTER I

ACTIONS FOR THE FORECLOSURE OF MORTGAGES.

SECTION 726. Proceedings in foreclosure suits.

727. Surplus money to be deposited in court.

728. Proceedings when debt secured falls due at different times.

SEC. 726. (§ 246) There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate or personal property, which action must be in accordance with the provisions of this chapter. In such action, the court may, by its judgment, direct a sale of the encumbered property, (or so much thereof as may be necessary), and the application of the proceeds of the sale to the payment of the costs of the court and the expenses of the sale, and the amount due to the plaintiff; and if it appear from the sheriff's return that the proceeds are insufficient, and a balance still remains due, judgment can then be docketed for such balance against the defendant or defendants personally liable for the debt, and it becomes a lien on the real estate of such judgment debtor, as in other cases on which execution may be issued. No person holding a conveyance from or under the mortgagor of the property mortgaged, or having a lien thereon, which conveyance or lien does not appear of record in the proper office at the time of the commencement of the action, need be made a party to such action; and the judgment therein rendered, and the proceedings therein had, is as conclusive against the party holding such unrecorded conveyance or lien as if he had been made a party to the action.

Proceedings
in foreclos-
ure suits.

SEC. 727. (§ 247.) If there be surplus money remaining after payment of the amount due on the mortgage, lien or encumbrance, with costs, the court may cause the same to be paid to the person entitled to it, and in the meantime may direct it to be deposited in court.

Surplus
money to be
deposited in
court.

SEC. 728. (§ 248.) If the debt, for which the mortgage, lien or encumbrance is held, is not all due, so soon as sufficient of the property has been sold to pay the amount due, with costs, the sale must cease; and afterwards, as often as more becomes due, for principal or interest, the

Proceedings
when debt
secured falls
due at dif-
ferent times.

court may, on motion, order more to be sold. But if the property cannot be sold in portions, without injury to the parties, the whole may be ordered to be sold in the first instance, and the entire debt and costs paid, there being a rebate of interest where such rebate is proper.

CHAPTER II.

ACTIONS FOR NUISANCE, WASTE AND WILFUL TRESPASS, IN CERTAIN CASES, ON REAL PROPERTY.

SECTION 731. Nuisance defined, and actions for.

732. Waste, actions for.

733. Trespass for cutting or carrying away trees, etc., actions for.

734. Measure of damages in certain cases under the last section.

735. Damages in actions for forcible entry, etc., may be trebled.

Nuisance defined, and actions for.

SEC. 731. (§ 249.) Anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action. Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance; and by the judgment, the nuisance may be enjoined or abated, as well as damages recovered.

Waste, actions for.

SEC. 732. (§ 250.) If a guardian, tenant for life or years, joint tenant, or tenant in common of real property, commit waste thereon, any person aggrieved by the waste may bring an action against him therefor, in which action there may be judgment for treble damages.

Trespass for cutting or carrying away trees, etc., actions for.

SEC. 733. (§ 251.) Any person who cuts down or carries off any wood or underwood, tree or timber, or girdles or otherwise injures any tree or timber on the land of another person, or on the street or highway in front of any person's house, village or city lot, or cultivated grounds; or on the commons or public grounds of any city or town, or on the street or highway in front thereof, without lawful authority, is liable to the owner of such land, or to such city or town, for treble the amount of damages which may be assessed therefor, in a civil action, in any court having jurisdiction.

Sec. 734. (§ 252.) Nothing in the last section authorizes the recovery of more than the just value of the timber taken from uncultivated woodland, for the repair of a public highway or bridge upon the land, or adjoining it.

Measure of damages in certain cases under the last section.

Sec. 735. (§ 253.) If a person recover damages for a forcible or unlawful entry in or upon, or detention of, any building or any cultivated real property, judgment may be entered for three times the amount at which the actual damages are assessed.

Damages in actions for forcible entry, etc., may be trebled.

CHAPTER III.

ACTIONS TO DETERMINE CONFLICTING CLAIMS TO REAL PROPERTY, AND OTHER PROVISIONS RELATING TO ACTIONS CONCERNING REAL ESTATE.

SECTION 738. Parties to an action to quiet title.

739. When plaintiff cannot recover costs.

740. If plaintiff's title terminates pending the suit, what he may recover, and how verdict and judgment to be.

741. When value of improvements can be allowed as a set-off.

742. An order may be made to allow a party to survey and measure the land in dispute.

743. Order, what to contain and how served. If unnecessary injury done, the party surveying to be liable therefor.

744. A mortgage must not be deemed a conveyance, whatever its terms.

745. When court may grant injunction; during foreclosure; after sale on execution, before conveyance.

746. Damages may be recovered for injury to the possession after sale and before delivery of possession.

747. Action not to be prejudiced by alienation, pending suit.

748. Mining claims, actions concerning to be governed by local rules.

Sec. 738. (§ 254.) An action may be brought by any person in possession, by himself or his tenant, of real property, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate or interest.

Parties to an action to quiet title.

Sec. 739. (§ 255.) If the defendant in such action disclaim in his answer any interest or estate in the property,

When plaintiff cannot recover costs

or suffer judgment to be taken against him without answer, the plaintiff cannot recover costs.

If plaintiff's title terminates pending the suit, what he may recover, and how verdict and judgment to be.

SEC. 740. (§ 256.) In an action for the recovery of real property, where the plaintiff shows a right to recover at the time the action was commenced, but it appears that his right has terminated during the pendency of the action, the verdict and judgment must be according to the fact, and the plaintiff may recover damages for withholding the property.

When value of improvements can be allowed as a set-off.

SEC. 741. (§ 257.) When damages are claimed for withholding the property recovered, upon which permanent improvements have been made by a defendant, or those under whom he claims, holding under color of title adversely to the claim of the plaintiff, in good faith, the value of such improvements must be allowed as a set-off against such damages.

An order may be made to allow a party to survey and measure the land in dispute.

SEC. 742. (§ 258.) The court in which an action is pending for the recovery of real property, or for damages for an injury thereto, or a judge thereof, or a county judge, may, on motion, upon notice by either party, for good cause shown, grant an order allowing to such party the right to enter upon the property and make survey and measurement thereof for the purpose of the action, even though entry for such purpose has to be made through other lands belonging to parties to the action.

Order, what to contain and how served.

SEC. 743. (§ 259.) The order must describe the property, and a copy thereof must be served on the owner or occupant; and thereupon such party may enter upon the property, with necessary surveyors and assistants, and make such survey and measurement; but if any unnecessary injury be done the property, he is liable therefor.

If unnecessary injury done, the party surveying to be liable therefor.

A mortgage must not be deemed a conveyance, whatever its terms.

SEC. 744. (§ 260.) A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale.

SEC. 745. (§ 261.) The court may, by injunction, on good cause shown, restrain the party in possession from

doing any act to the injury of real property during the foreclosure of a mortgage thereon; or, after a sale on execution, before a conveyance.

When court may grant injunction; during foreclosure; after sale on execution, before conveyance. Damages may be recovered for injury to the possession after sale and before delivery of possession.

SEC. 746. (§ 262.) When real property has been sold on execution, the purchaser thereof, or any person who may have succeeded to his interest, may, after his estate becomes absolute, recover damages for injury to the property by the tenant in possession after sale and before possession is delivered under the conveyance.

SEC. 747. (§ 263.) An action for the recovery of real property against a person in possession cannot be prejudiced by any alienation made by such person, either before or after the commencement of the action.

Action not to be prejudiced by alienation, pending suit.

SEC. 748. (§ 621.) In actions respecting mining claims, proof must be admitted of the customs, usages or regulations established and in force at the bar or diggings embracing such claim; and such customs, usages or regulations, when not in conflict with the laws of this state, must govern the decision of the action.

Mining claims, actions concerning to be governed by local rules.

CHAPTER IV.

ACTIONS FOR THE PARTITION OF REAL PROPERTY.

SECTION 752. Who may bring actions for partition.

753. Interests of all parties must be set forth in the complaint.

754. Lien-holders not of record need not be made parties.

755. Plaintiff must file notice of *lis pendens*.

756. Summons must be directed to all persons interested in the property.

757. Unknown parties may be served by publication.

758. Answer of defendants, what to contain.

759. The rights of all parties may be ascertained in the action.

760. Partial partition.

761. Lien-holders must be made parties, or a referee be appointed to ascertain their rights.

762. Lien-holders must be notified to appear before the referee appointed.

763. The court may order a sale or partition and appoint referees therefor.

764. Partition must be made according to the rights of the parties, as determined by the court.

SECTION 765. Referees must make a report of their proceedings.

766. The court may set aside or affirm report, and enter judgment thereon. Upon whom judgment to be conclusive.

767. Judgment not to affect tenants for years to the whole property.

768. Expenses of partition must be apportioned among the parties.

769. A lien on an undivided interest of any party is a charge only on the share assigned to such party.

770. Estate for life or years may be set off in a part of the property not sold, when not all sold.

771. Application of proceeds of sale of encumbered property.

772. Party holding other securities may be required first to exhaust them.

773. Proceeds of sale, disposition of.

774. When paid into court the cause may be continued for the determination of the claims of the parties.

775. Sales by referees must be at public auction.

776. The court must direct the terms of sale or credit.

777. Referees may take securities for purchase money.

778. Tenants whose estate has been sold shall receive compensation.

779. The court may fix such compensation.

780. The court must protect tenants unknown.

781. The court must ascertain and secure the value of future contingent or vested interests.

782. Terms of sale must be made known at the time. Lots must be sold separately.

783. Who may not be purchasers.

784. Referees must make a report of the sale to the court.

785. If confirmed, conveyances may be executed.

786. Proceeding if a lien-holder become a purchaser.

787. Conveyances must be recorded, and will be a bar against parties.

788. Proceeds of sale belonging to parties unknown must be invested for their benefit.

789. Investment must be made in the name of the clerk of the county.

790. When the interests of the parties are ascertained, securities must be taken in their names.

791. Duties of the clerk making investments.

792. When unequal partition is ordered, compensation may be adjudged in certain cases.

793. The share of an infant may be paid to his guardian.

794. The guardian of an insane person may receive the proceeds of such party's interest.

795. A guardian may consent to partition without action, and execute releases.

796. Costs of partition a lien upon the shares of the parceners.

797. The court by consent may appoint a single referee.

Who may
bring actions
for partition.

SEC. 752. (§ 264.) When several co-tenants hold and are in possession of real property as parceners, joint tenants or tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or

for years, an action may be brought by one or more of such persons for a partition thereof according to the respective rights of the persons interested therein, and for a sale of such property, or a part thereof, if it appear that a partition cannot be made without great prejudice to the owners.

SEC. 753. (§ 265.) The interests of all persons in the property, whether such persons be known or unknown, must be set forth in the complaint specifically and particularly, as far as known to the plaintiff; and if one or more of the parties, or the share or quantity of interest of any of the parties, be unknown to the plaintiff, or be uncertain or contingent, or the ownership of the inheritance depend upon an executory devise, or the remainder be a contingent remainder, so that such parties cannot be named, that fact must be set forth in the complaint.

Interests of all parties must be set forth in the complaint.

SEC. 754. (§ 266.) No person having a conveyance of or claiming a lien on the property, or some part of it, need be made a party to the action, unless such conveyance or lien appear of record.

Lien-holders not of record need not be made parties

SEC. 755. (§ 267.) Immediately after filing the complaint in the district court, the plaintiff must file with the recorder of the county, or of the several counties in which the property is situated, either a copy of such complaint or a notice of the pendency of the action, containing the names of the parties so far as known, the object of the action, and a description of the property to be affected thereby. From the time of the filing it shall be deemed notice to all persons.

Plaintiff must file notice of *lis pendens*.

SEC. 756. (§ 268.) The summons must be directed to all the joint tenants and tenants in common, and all persons having any interest in, or any liens of record by mortgage, judgment or otherwise, upon the property, or upon any particular portion thereof; and generally, to all persons unknown who have or claim any interest in the property.

Summons must be directed to all persons interested in the property

SEC. 757. (§ 269) If a party having a share or interest is unknown, or any one of the known parties reside out of the state, or cannot be found therein, and such fact is

Unknown parties may be served by publication.

made to appear by affidavit, the summons may be served on such absent or unknown party by publication, as in other cases. When publication is made, the summons, as published, must be accompanied by a brief description of the property which is the subject of the action.

Answer of
defendants,
what to
contain.

SEC. 758. (§ 270.) The defendants who have been personally served with the summons and a copy of the complaint, or who have appeared without such service, must set forth in their answers, fully and particularly, the origin, nature and extent of their respective interests in the property; and if such defendants claim a lien on the property by mortgage, judgment or otherwise, they must state the original amount and date of the same, and the sum remaining due thereon; also, whether the same has been secured in any other way or not; and if secured, the nature and extent of such security, or they are deemed to have waived their right to such lien.

The rights
of all parties
may be as-
certained in
the action.

SEC. 759. (§ 271.) The rights of the several parties, plaintiff as well as defendant, may be put in issue, tried and determined in such action; and when a sale of the premises is necessary, the title must be ascertained by proof to the satisfaction of the court, before the judgment of sale can be made; and where service of the complaint has been made by publication, like proof must be required of the right of the absent or unknown parties, before such judgment is rendered; except that where there are several unknown persons having an interest in the property their rights may be considered together in the action, and not as between themselves.

Partial par-
tition.

SEC. 760. (§ 272.) Whenever from any cause it is, in the opinion of the court, impracticable or highly inconvenient to make a complete partition, in the first instance, among all the parties in interest, the court may first ascertain and determine the shares or interest respectively held by the original co-tenants, and thereupon adjudge and cause a partition to be made, as if such original co-tenants were the parties and sole parties in interest, and the only parties to the action, and thereafter may proceed in like manner to adjudge and make partition separately of each share or portion so ascertained and allotted, as between those claiming under the original tenant to

whom the same shall have been so set apart, or may allow them to remain tenants in common thereof, as they may desire.

Sec. 761. (§ 273.) If it appears to the court, by the certificate of the county recorder or county clerk, or by the sworn or verified statement of any person who may have examined or searched the records, that there are outstanding liens or encumbrances of record upon such real property, or any part or portion thereof, which existed and were of record at the time of the commencement of the action, and the persons holding such liens are not made parties to the action, the court must either order such persons to be made parties to the action, by an amendment or supplemental complaint, or appoint a referee to ascertain whether or not such liens or encumbrances have been paid, or if not paid, what amount remains due thereon, and their order among the liens or encumbrances severally held by such persons and the parties to the action, and whether the amount remaining due thereon has been secured in any manner, and if secured, the nature and extent of the security.

Lien-holders must be made parties or a referee be appointed to ascertain their rights.

Sec. 762. (§ 274.) The plaintiff must cause a notice to be served, a reasonable time previous to the day for appearance before the referee appointed as provided in the last section, on each person having outstanding liens of record, who is not a party to the action, to appear before the referee at a specified time and place, to make proof, by his own affidavit or otherwise, of the amount due or to become due, contingently or absolutely thereon. In case such person be absent, or his residence be unknown, service may be made by publication, or notice to his agents, under the direction of the court, in such manner as may be proper. The report of the referee thereon must be made to the court, and must be confirmed, modified or set aside, and a new reference ordered, as the justice of the case may require.

Lien-holders must be notified to appear before the referee appointed.

Sec. 763. (§ 275.) If it be alleged in the complaint and established by evidence, or if it appear by the evidence without such allegation in the complaint, to the satisfaction of the court, that the property, or any part of it,

The court may order a sale or partition and appoint referees therefor.

is so situated that partition cannot be made without great prejudice to the owners, the court may order a sale thereof. Otherwise, upon the requisite proofs being made, it must order a partition, according to the respective rights of the parties, as ascertained by the court, and appoint three referees therefor; and must designate the portion to remain undivided for the owners whose interests remain unknown or are not ascertained.

Partition must be made according to the rights of the parties, as determined by the court.

SEC. 764. (§ 276.) In making the partition the referees must divide the property and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties as determined by the court, pursuant to the provisions of this chapter, designating the several portions by proper landmarks, and may employ a surveyor with the necessary assistants to aid them.

Referees must make a report of their proceedings.

SEC. 765. (§ 277.) The referees must make a report of their proceedings, specifying therein the manner in which they executed their trust, and describing the property divided, and the shares allotted to each party, with a particular description of each share.

The court may set aside or affirm report, and enter judgment thereon

SEC. 766. (§ 278.) The court may confirm, change, modify or set aside the report, and, if necessary, appoint new referees. Upon the report being confirmed, judgment must be rendered that such partition be effectual forever, which judgment is binding and conclusive—

1. On all persons named as parties to the action, and their legal representatives, who have at the time any interest in the property divided, or any part thereof, as owners in fee or as tenants for life or for years, or as entitled to the reversion, remainder or the inheritance of such property, or of any part thereof, after the determination of a particular estate therein, and who by any contingency may be entitled to a beneficial interest in the property, or who have an interest in any undivided share thereof, as tenants for years or for life.

2. On all persons interested in the property, who may be unknown, to whom notice has been given of the action for partition by publication.

3. On all other persons claiming from such parties or persons, or either of them.

And no judgment is invalidated by reason of the death of any party before final judgment or decree; but such judgment or decree is as conclusive against the heirs, legal representatives or assigns of such decedent, as if it had been entered before his death.

Upon whom judgment to be conclusive.

SEC. 767. (§ 279.) The judgment does not affect tenants for years less than ten, to the whole of the property which is the subject of the partition.

Judgment not to affect tenants for years to the whole property.

SEC. 768. (§ 280.) The expenses of the referees, including those of a surveyor and his assistants, when employed, must be ascertained and allowed by the court, and the amount thereof, together with the fees allowed by the court, in its discretion, to the referees, must be apportioned among the different parties to the action, equitably.

Expenses of partition must be apportioned among the parties.

SEC. 769. (§ 281.) When a lien is on an undivided interest or estate of any of the parties, such lien, if a partition be made, shall thenceforth be a charge only on the share assigned to such party; but such share must be first charged with its just proportion of the costs of the partition, in preference to such lien.

A lien on an undivided interest of any party is a charge only on the share assigned to such party.

SEC. 770. (§ 282.) When a part of the property only is ordered to be sold, if there be an estate for life or years, in an undivided share of the whole property, such estate may be set off in any part of the property not ordered to be sold.

Estate for life or years may be set off in a part of the property not sold, when not all sold.

SEC. 771. (§ 283.) The proceeds of the sale of encumbered property must be applied under the direction of the court, as follows:

Application of proceeds of sale of encumbered property.

1. To pay its just proportion of the general costs of the action.

2. To pay the costs of the reference.

3. To satisfy and cancel of record the several liens in their order of priority, by payment of the sums due and to become due; the amount due to be verified by affidavit at the time of payment.

4. The residue among the owners of the property sold, according to their respective shares therein.

Party holding other securities may be required first to exhaust them.

SEC. 772. (§ 284.) Whenever any party to an action, who holds a lien upon the property, or any part thereof, has other securities for the payment of the amount of such lien, the court may, in its discretion, order such securities to be exhausted before a distribution of the proceeds of sale, or may order a just deduction to be made from the amount of the lien on the property, on account thereof.

Proceeds of sale, disposition of.

SEC. 773. (§ 285.) The proceeds of sale and the securities taken by the referees, or any part thereof, must be distributed by them to the persons entitled thereto, whenever the court so directs. But in case no direction be given, all of such proceeds and securities must be paid into court, or deposited therein, or as directed by the court.

When paid into court the cause may be continued for the determination of the claims of the parties.

SEC. 774. (§ 286.) When the proceeds of the sale of any share or parcel belonging to persons who are parties to the action, and who are known, are paid into court, the action may be continued as between such parties, for the determination of their respective claims thereto, which must be ascertained and adjudged by the court. Further testimony may be taken in court, or by a referee, at the discretion of the court, and the court may, if necessary, require such parties to present the facts or law in controversy, by pleadings, as in an original action.

Sales by referees must be at public auction.

SEC. 775. (§ 287.) All sales of real property, made by referees under this chapter, must be made at public auction to the highest bidder, upon notice published in the manner required for the sale of real property on execution. The notice must state the terms of sale, and if the property or any part of it is to be sold subject to a prior estate, charge or lien, that must be stated in the notice.

The court must direct the terms of sale or credit.

SEC. 776. (§ 288.) The court must, in the order for sale, direct the terms of credit which may be allowed for the purchase money of any portion of the premises of which it may direct a sale on credit, and for that portion of which the purchase money is required, by the provisions hereinafter contained, to be invested for the benefit of unknown owners, infants or parties out of the state.

SEC. 777. (§ 289.) The referees may take separate mortgages and other securities for the whole, or convenient portions of the purchase money, of such parts of the property as are directed by the court to be sold on credit, for the shares of any known owner of full age, in the name of such owner; and for the shares of an infant, in the name of the guardian of such infant; and for other shares, in the name of the clerk of the county and his successors in office.

Referees may take securities for purchase money.

SEC. 778. (§ 290.) The person entitled to a tenancy for life, or years, whose estate has been sold, is entitled to receive such sum as may be deemed a reasonable satisfaction for such estate, and which the person so entitled may consent to accept instead thereof, by an instrument in writing, filed with the clerk of the court. Upon the filing of such consent, the clerk must enter the same in the minutes of the court.

Tenants whose estate has been sold shall receive compensation.

SEC. 779. (§ 291.) If such consent be not given, filed and entered, as provided in the last section, at or before a judgment of sale is rendered, the court must ascertain and determine what proportion of the proceeds of the sale, after deducting expenses, will be a just and reasonable sum to be allowed on account of such estate; and must order the same to be paid to such party, or deposited in court for him, as the case may require.

The court may fix such compensation.

SEC. 780. (§ 292.) If the persons entitled to such estate for life or years be unknown, the court must provide for the protection of their rights, in the same manner, as far as may be, as if they were known and had appeared.

The court must protect tenants unknown.

SEC. 781. (§ 293.) In all cases of sales, when it appears that any person has a vested or contingent future right or estate in any of the property sold, the court must ascertain and settle the proportional value of such contingent or vested right or estate, and must direct such proportion of the proceeds of the sale to be invested, secured or paid over, in such manner as to protect the rights and interests of the parties.

The court must ascertain and secure the value of future contingent or vested interests

SEC. 782. (§ 294.) In all cases of sales of property the terms must be made known at the time; and if the prem-

Terms of sale must be made known at the time.

Lots must be sold separately.

ises consist of distinct farms or lots, they must be sold separately.

Who may not be purchasers.

SEC. 783. (§ 295.) Neither of the referees, nor any person for the benefit of either of them, can be interested in any purchase; nor can a guardian of an infant party be interested in the purchase of any real property, being the subject of the action, except for the benefit of the infant. All sales contrary to the provisions of this section are void.

Referees must make a report of the sale to the court.

SEC. 784. (§ 296.) After completing a sale of the property, or any part thereof ordered to be sold, the referees must report the same to the court, with a description of the different parcels of land sold to each purchaser; the name of the purchaser; the price paid or secured; the terms and conditions of the sale, and the securities, if any, taken. The report must be filed in the office of the clerk of the county where the property is situated.

If confirmed, conveyance may be executed.

SEC. 785. (§ 297.) If the sale be confirmed by the court an order must be entered, directing the referees to execute conveyances and take securities pursuant to such sale, which they are hereby authorized to do. Such order may also give directions to them respecting the disposition of the proceeds of the sale.

Proceeding if a lien-holder becomes a purchaser.

SEC. 786. (§ 298) When a party entitled to a share of the property, or an encumbrancer entitled to have his lien paid out of the sale, becomes a purchaser, the referees may take his receipt for so much of the proceeds of the sale as belongs to him.

Conveyances must be recorded, and will be a bar against parties.

SEC. 787. (§ 299.) The conveyances must be recorded in the county where the premises are situated, and shall be a bar against all persons interested in the property in any way, who shall have been named as parties in the action; and against all such parties and persons as were unknown, if the summons was served by publication, and against all persons claiming under them, or either of them.

Proceeds of sale belonging to parties unknown must be invested for their benefit.

SEC. 788. (§ 300.) When there are proceeds of a sale belonging to an unknown owner, or to a person without the state, who has no legal representative within it, the

same must be invested in securities, on interest, for the benefit of the persons entitled thereto.

SEC. 789. (§ 301.) When the security of the proceeds of sale is taken, or when an investment of any such proceeds is made, it must be done, except as herein otherwise provided, in the name of the clerk of the county where the papers are filed, and his successors in office, who must hold the same for the use and benefit of the parties interested, subject to the order of the court.

Investment must be made in the name of the clerk of the county.

SEC. 790. (§ 302.) When security is taken by the referees on a sale, and the parties interested in such security, by an instrument in writing, under their hands, delivered to the referees, agree upon the shares and proportions to which they are respectively entitled; or when shares and proportions have been previously adjudged by the court, such securities must be taken in the names of, and payable to, the parties respectively entitled thereto, and must be delivered to such parties upon their receipt therefor. Such agreement and receipt must be returned and filed with the clerk.

When the interests of the parties are ascertained, securities must be taken in their names.

SEC. 791. (§ 303.) The clerk in whose name a security is taken, or by whom an investment is made, and his successors in office, must receive the interest and principal as it becomes due, and apply and invest the same as the court may direct; and must file in his office all securities taken, and keep an account in a book provided and kept for that purpose, in the clerk's office, free for inspection by all persons, of investments and moneys received by him thereon, and the disposition thereof.

Duties of the clerk making investments.

SEC. 792. (§ 304.) When it appears that partition cannot be made equal between the parties, according to their respective rights, without prejudice to the rights and interests of some of them, and a partition be ordered, the court may adjudge compensation to be made by one party to another, on account of the inequality; but such compensation shall not be required to be made to others by owners unknown, nor by an infant, unless it appears that such infant has personal property sufficient for that purpose, and that his interest will be promoted thereby. And in all cases, the court has power to make compensa-

When unequal partition is ordered, compensation may be adjudged in certain cases

tory adjustment between the respective parties, according to the ordinary principles of equity.

The share of an infant may be paid to his guardian.

SEC. 793. (§ 305.) When the share of an infant is sold, the proceeds of the sale may be paid by the referee making the sale, to his general guardian, or the special guardian appointed for him in the action, upon giving the security required by law or directed by order of the court.

The guardian of an insane person may receive the proceeds of such party's interest.

SEC. 794. (§ 306.) The guardian who may be entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, whose interest in real property has been sold, may receive, in behalf of such person, his share of the proceeds of such real property, from the referees, on executing, with sufficient sureties, an undertaking approved by a judge of the court, or by a county judge, that he will faithfully discharge the trust reposed in him, and will render a true and just account to the person entitled, or to his legal representative.

A guardian may consent to partition without action, and execute releases.

SEC. 795. (§ 307.) The general guardian of an infant, and the guardian entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, who is interested in real estate held in joint tenancy, or in common, or in any other manner so as to authorize his being made a party to an action for the partition thereof, may consent to a partition without action, and agree upon the share to be set off to such infant or other person entitled, and may execute a release in his behalf to the owners of the shares, of the parts to which they may be respectively entitled, upon an order of the court.

Costs of partition a lien upon the shares of the parceners.

SEC. 796. (§ 308.) The costs of partition, including fees of referees and other disbursements, must be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the judgment. In that case, they shall be a lien on the several shares, and the judgment may be enforced by execution against such shares, and against other property held by the respective parties. When, however, a litigation arises between some of the

parties only, the court may require the expense of such litigation to be paid by the parties thereto, or any of them.

SEC. 797. (§ 309.) The court, with the consent of the parties, may appoint a single referee, instead of three referees, in the proceedings under the provisions of this chapter; and the single referee, when thus appointed, has all the powers and may perform all the duties required of the three referees.

The court by consent may appoint a single referee.

CHAPTER V.

ACTIONS FOR THE USURPATION OF AN OFFICE OR FRANCHISE.

SECTION 802. Certain writs abolished.

- 803. Action may be brought against any party usurping, etc., any office or franchise.
- 804. Name of person entitled to office may be set forth in the complaint. If fees have been received by the usurper, he may be arrested.
- 805. Judgment may determine the rights of both incumbent and claimant.
- 806. When rendered in favor of applicant.
- 807. Damages may be recovered by successful applicant.
- 808. When several persons claim the same office, their rights may be determined by a single action.
- 809. If defendant found guilty, what judgment to be rendered against him.

SEC. 802. The writ of scire facias, the writ of quo warranto, and proceedings by information in the nature of quo warranto, are abolished. The remedies obtainable in these forms may hereafter be obtained by civil actions, under the provisions of this chapter.

Certain writs abolished.

SEC. 803. (§ 310.) An action may be brought by the attorney-general, in the name of the people of this state, upon his own information, or upon the complaint of a private party, against any person who usurps, intrudes into or unlawfully holds or exercises any public office, civil or military, or any franchise within this state. And the attorney-general must bring the action, whenever he has reason to believe that any such office or franchise has been usurped, intruded into or unlawfully held or exercised by any person, or when he is directed to do so by the governor.

Action may be brought against any party usurping, etc., any office or franchise.

Name of person entitled to office may be set forth in the complaint.

If fees have been received by the usurper, he may be arrested.

SEC. 804. (§ 311) Whenever such action is brought, the attorney-general, in addition to the statement of the cause of action, may also set forth in the complaint the name of the person rightly entitled to the office, with a statement of his right thereto; and in such case, upon proof by affidavit that the defendant has received fees or emoluments belonging to the office, and by means of his usurpation thereof, an order may be granted by a justice of the supreme court, or a district judge, for the arrest of such defendant, and holding him to bail; and thereupon he may be arrested and held to bail, in the same manner and with the same effect, and subject to the same rights and liabilities, as in other civil actions where the defendant is subject to arrest.

Judgment may determine the rights of both incumbent and claimant.

SEC. 805. (§ 312.) In every such action, judgment may be rendered upon the right of the defendant, and also upon the right of the party so alleged to be entitled, or only upon the right of the defendant, as justice may require.

When rendered in favor of applicant.

SEC. 806. (§ 313.) If the judgment be rendered upon the right of the person so alleged to be entitled, and the same be in favor of such person, he will be entitled, after taking the oath of office and executing such official bond as may be required by law, to take upon himself the execution of the office.

Damages may be recovered by successful applicant.

SEC. 807. (§ 314.) If judgment be rendered upon the right of the person so alleged to be entitled, in favor of such person, he may recover, by action, the damages which he may have sustained by reason of the usurpation of the office by the defendant.

When several persons claim the same office, their rights may be determined by a single action.

SEC. 808. (§ 315.) When several persons claim to be entitled to the same office or franchise, one action may be brought against all such persons, in order to try their respective rights to such office or franchise.

If defendant found guilty, what judgment to be rendered against him

SEC. 809. (§ 316.) When a defendant, against whom such action has been brought, is adjudged guilty of usurping or intruding into, or unlawfully holding any office, franchise or privilege, judgment must be rendered that such defendant be excluded from the office, franchise or

privilege, and that he pay the costs of the action. The court may also, in its discretion, impose upon the defendant a fine not exceeding five thousand dollars, which fine, when collected, must be paid into the treasury of the state.

CHAPTER VI.

OF ACTIONS AGAINST STEAMERS, VESSELS AND BOATS.

SECTION 813. When vessels, etc., are liable. Their liabilities constitute liens.

814. Actions may be brought directly against such vessels, etc.

815. Complaint must be verified.

816. Summons may be served on the master, mate, etc.

817. Plaintiff may have such vessel, etc., attached.

818. The clerk must issue the writ of attachment.

819. Such writ must be directed to the sheriff. Sheriff may release upon sufficient undertaking.

820. Sheriff must execute such writ without delay.

821. The owner, master, etc., may appear and defend such vessel.

822. Proceedings in actions under this chapter.

823. After appearance attachment may, on motion, be discharged.

824. When not discharged, such vessel, etc., may be sold at public auction. Application of proceeds.

825. Mariners and others may assert their claim for wages, notwithstanding prior attachment. How enforced.

826. Proof of the claims of mariners and others.

827. Sheriff's notice of sale to contain measurement, tonnage, etc.

Sec. 813. (§ 317.) All steamers, vessels and boats are liable—

When vessels, etc., are liable.

1. For services rendered on board at the request of, or on contract with, their respective owners, masters, agents or consignees.

2. For supplies furnished for their use at the request of their respective owners, masters, agents or consignees.

3. For materials furnished for their construction, repair or equipment.

4. For their wharfage and anchorage within this state.

5. For injuries committed by them to persons or property.

The several causes of action constitute liens upon all steamers, vessels and boats, and have priority in their order herein enumerated, and have preference over all

Their liabilities constitute liens.

other demands ; but such liens only continue in force for the period of one year from the time the cause of action accrued.

Actions may be brought directly against such vessels, etc.

SEC. 814. (§ 318.) Actions for damages arising upon any of the grounds specified in the preceding section may be brought directly against such steamers, vessels or boats.

Complaint must be verified.

SEC. 815. (§ 319.) The complaint must designate the steamer, vessel or boat by name, and must be verified by the oath of the plaintiff, or some one on his behalf.

Summons may be served on the master, mate, etc.

SEC. 816. (§ 320.) The summons, attached to a certified copy of the complaint, may be served on the master, mate or person having charge of the steamer, vessel or boat against which the action is brought.

Plaintiff may have such vessel, etc., attached.

SEC. 817. (§ 321.) The plaintiff, at the time of issuing the summons, or at any time afterwards, may have the steamer, vessel or boat against which the action is brought, with its tackle, apparel and furniture, attached as security for the satisfaction of any judgment that may be recovered therein.

The clerk must issue the writ of attachment.

SEC. 818. (§ 322.) The clerk of the court must issue a writ of attachment, on the application of the plaintiff, upon receiving a written undertaking on behalf of the plaintiff, executed by two or more sufficient sureties, to the effect that if judgment be rendered in favor of the steamer, vessel or boat, as the case may be, he will pay all costs and damages that may be awarded against him, and all damages that may be sustained by such steamer, vessel or boat from the attachment, not exceeding the sum specified in the undertaking, which shall in no case be less than five hundred dollars when the attachment is issued against a steamer or vessel, or less than two hundred dollars when issued against a boat.

Such writ must be directed to the sheriff.

SEC. 819. (§ 323.) The writ must be directed to the sheriff of the county within which the steamer, vessel or boat lies, and direct him to attach such steamer, vessel or boat, with its tackle, apparel and furniture, and keep the same in his custody until discharged in due course of

law, unless the owner, master, agent or consignee thereof give him security, by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy the demand in suit, besides costs; in which case, to take such undertaking.

Sheriff may release upon sufficient undertaking

SEC. 820. (§ 324.) The sheriff to whom the writ is directed and delivered must execute it without delay, and must, unless the undertaking mentioned in the last section is given, attach and keep in his custody the steamer, vessel or boat named therein, with its tackle, apparel and furniture, until discharged in due course of law; but the sheriff is not authorized by any such writ to interfere with the discharge of any merchandise on board of such steamer, vessel or boat, or with the removal of any trunks or other property of passengers, or of the captain, mate, seamen, steward, cook or other persons employed on board.

Sheriff must execute such writ without delay.

SEC. 821. (§ 325.) The owner, master, agent or consignee of the steamer, vessel or boat against which the action is brought may appear and answer, or plead to the action; and may except to the sufficiency of the sureties on the undertaking filed on the behalf of the plaintiff, and may require sureties to justify, as in actions against individuals upon bail on arrest.

The owner, master, etc., may appear and defend such vessel.

SEC. 822. (§ 326.) All proceedings in actions under the provisions of this chapter must be conducted in the same manner as in actions against individuals, except as otherwise herein provided; and in all proceedings subsequent to the complaint, the steamer, vessel or boat may be designated as defendant.

Proceedings in actions under this chapter.

SEC. 823. (§ 327.) After the appearance in the action of the owner, master, agent or consignee, the attachment may, on motion, be discharged in the same manner, and on like terms and conditions, as attachments in other cases, subject to the provisions of section eight hundred and twenty-five.

After appearance attachment may, on motion, be discharged.

SEC. 824. (§ 328.) If the attachment be not discharged, and a judgment be recovered in the action in favor of the plaintiff, and an execution be issued thereon, the sheriff

When not discharged, such vessel, may be sold at public auction.

must sell at public auction, after publication of notice of such sale for ten days, the steamer, vessel or boat, with its tackle, apparel and furniture, or such interest therein as may be necessary, and must apply the proceeds of the sale as follows :

Application
of proceeds.

1. When the action is brought for demands other than the wages of mariners, boatmen and others employed in the service of the steamer, vessel or boat sold, to the payment of the amount of such wages, as specified in the execution.

2. To the payment of the judgment and costs, including his fees.

3. He must pay any balance remaining to the owner, master, agent or consignee, who may have appeared in the action; or if there be no appearance, then into court, subject to the claim of any party or parties legally entitled thereto.

Mariners
and others
may assert
their claim
for wages,
notwith-
standing
prior attach-
ment.

How en-
forced.

SEC. 825. (§ 329.) Any mariner, boatman or other person employed in the service of the steamer, vessel or boat attached, who may wish to assert his claim for wages against the same, the attachments being issued for other demands than such wages, may file an affidavit of his claim, setting forth the amount and the particular service rendered, with the clerk of the court; and thereafter no attachment can be discharged upon filing an undertaking, unless the amount of such claim, or the amount determined, as provided in the next section, be covered thereby in addition to the other requirements; and any execution issued against such steamer, vessel or boat, upon judgment recovered thereafter, must direct the application of the proceeds of any sale—

1. To the payment of the amount of such claims filed, or the amount determined, as provided in the next section, which amount the clerk must insert in the writ.

2. To the payment of the judgment and costs and sheriff's fees, and must direct the payment of any balance to the owner, master or consignee who may have appeared in the action; but if no appearance by them be made therein, it must direct a deposit of the balance in court.

Proof of the
claims of
mariners
and others.

SEC. 826. (§ 330.) If the claim of the mariner, boatman or other person, filed with the clerk of the court, as

provided in the last section, be not contested within five days after notice of the filing thereof, by the owner, master, agent or consignee of the steamer, vessel or boat, against which the claim is filed, it is deemed admitted; but if contested, the clerk must indorse upon the affidavit thereof a statement that it is contested, and the grounds of the contest; and must immediately thereafter order the matter to a single referee for his determination, or he may hear the proofs and determine the matter himself. The judgment of the clerk or referee may be reviewed by the county judge, either in term or vacation, immediately after the same is given, and the judgment of the county judge is final. On the review, the county judge may use the minutes of the proofs taken by the clerk or referee, or may take the proofs anew.

SEC. 827. (§ 331.) The notice of sale published by the sheriff must contain a statement of the measurement and tonnage of the steamer, vessel or boat, and a general description of her condition.

Sheriff's
notice of sale
to contain
measure-
ment, ton-
nage, etc.

TITLE XI.

OF PROCEEDINGS IN JUSTICES' COURTS.

CHAPTER I. *Parties and time and place of commencing actions in justices' courts.*

- II. *Summons in justices' courts.*
- III. *Of provisional remedies in justices' courts.*
- IV. *Pleadings and trial.*
- V. *New trials.*
- VI. *Judgment and execution.*
- VII. *General provisions relating to justices' courts.*

CHAPTER I.

PARTIES AND TIME AND PLACE OF COMMENCING ACTIONS IN JUSTICES' COURTS.

SECTION 832. Parties may appear in person or by attorney.

833. Venue of actions in justices' courts.

834. Judgment by confession, venue of.

835. Actions in which parties voluntarily appear, venue of.

Parties may
appear in
person or by
attorney.

SEC. 832. (§ 534.) Parties in justices' courts may prosecute or defend in person or by attorney; and any person, on the request of a party, may act as his attorney, except that the constable by whom the summons or jury process was served, cannot appear or act on the trial in behalf of either party.

Venue of
actions in
justices'
courts.

SEC. 833. (§ 535.) No person can be held to answer to any summons issued against him from a justice's court, in a civil action, in any township or city other than the one in which he resides, except in the cases following:

1. When there is no justice's court for the township or city in which the defendant may reside, or no justice competent to act on the case.

2. When two or more persons are jointly, or jointly and severally, bound in any debt or contract, or otherwise jointly liable in the same action, and reside in different townships or different cities of the same county, or in different counties, the plaintiff may prosecute his action in a justice's court of the township or city in which any of the debtors or other persons liable may reside.

3. In cases of injury to the person, or to real or personal property, the plaintiff may prosecute his action in the township or city where the injury was committed.

4. Where personal property, unjustly taken or detained, is claimed, or damages therefor are claimed, the plaintiff may bring his action in any township or city in which the property may be found, or in which the property was taken.

5. When the defendant is a non-resident of the county, he may be sued in any township or city wherein he may be found, or when a non-resident of the state, in any township in the state.

6. When a person has contracted to perform an obligation at a particular place, and reside in another county, or in a township or city of the same county, he may be sued in the township or city in which such obligation is to be performed or in which he resides; and for the purpose of justices' courts' jurisdiction under this clause, the township or city in which the obligation is incurred shall be deemed to be the township or city in which it is to be performed, unless there is a special contract to the contrary.

Sec. 834. (§ 536.) Judgment upon confession may be entered up in any justice's court in the state, specified in the confession. Judgment by confession, venue of.

Sec. 835. (§ 537.) Justices' courts shall have jurisdiction of an action and the persons of the parties thereto upon the voluntary appearance of the parties without summons; and without regard to their residences, or the place where the cause of action arose or the subject matter of the action may exist. The plaintiff may commence an action by summons, either in the township or city where the contract was, by its terms, to be performed, or in which the defendant resides, as he may elect. Actions in which parties voluntarily appear, venue of.

CHAPTER II.

SUMMONS IN JUSTICES' COURTS.

SECTION 839. Actions, how commenced.

840. Appointment of guardians.

841. Summons, formal and substantial facts of.

842. Time within which summons shall be returned.

843. Summons, by whom and how served and returned.

Sec. 839. (§ 538.) Actions in justices' courts are commenced by filing a copy of the account, note, bill, bond or instrument upon which the action is brought, or a concise statement in writing of the cause of action and the issuing of a summons thereon, within one year after the filing of the same, or by the voluntary appearance and pleadings of the parties without summons. In the latter case the action is deemed commenced at the time of appearance. Actions, how commenced.

Sec. 840. (§ 539.) When a guardian is necessary, he must be appointed by the justice, as follows: Appointment of guardians.

1. If the infant be plaintiff, the appointment must be made before the summons is issued, upon the application of the infant, if he be of the age of fourteen years or upwards; if under that age, upon the application of some relative or friend. The consent in writing of the guardian to be appointed to act as such, and to be responsible for costs if he fail in the action, must be first filed with the justice.

2. If the infant be defendant, the guardian must be appointed at the time the summons is returned, or before the pleadings. It is the right of the infant to nominate his own guardian, if the infant be over fourteen years of age, and the proposed guardian be present and consent in writing to be appointed. Otherwise, the justice may appoint any suitable person who gives such consent.

Summons,
formal and
substantial
facts of.

SEC. 841. (§ 540.) The summons must be addressed to the defendant by name, or if his name is unknown, by a fictitious name; and must summon him to appear before the justice at his office, naming its township or city, and at a time specified therein, to answer the complaint of the plaintiff, for a cause of action therein described in general terms, sufficient to apprise the defendant of the nature of the claim against him; and in action for money or damages, must state the amount for which the plaintiff will take judgment if the defendant fail to appear and answer. It must be subscribed by the justice before whom it is returnable.

Time within
which sum-
mons shall
be returned.

SEC. 842. (§ 541.) The time in which the summons must require the defendant to appear and answer the complaint is as follows:

1. If the plaintiff and defendant reside in the township where the action is brought: within ten days after the service thereof.

2. If the plaintiff and defendant reside out of the township, but within the county, where the action is brought: within five days after the service thereof.

3. If the plaintiff reside out of the township where the action is brought, and the defendant resides in said township: within three days after the service thereof.

4. If the defendant reside out of the county or township in which the action is brought, and plaintiff resides in said township: within fifteen days after the service thereof.

The defendant may appear in the action by demurrer or answer any time after service of summons upon him, and must notify the plaintiff, by written notice, of such appearance. If any of the defendants fail to answer or appear in the action, within the time prescribed in the summons, the default must be entered by the justice in his docket. If all the defendants fail to appear or answer,

within the time prescribed in the summons, the justice must thereupon enter judgment against them for the amount demanded in the summons, where the action is brought upon a contract for the direct payment of money; and in all other cases must hear the proofs and give judgment in accordance with the pleadings and proofs. Where all the defendants served with process have appeared, or some of them have appeared and the remaining defendants have made default, the justice may proceed to try the cause, or, upon good cause shown by either party, may fix the day for trial on any subsequent day not more than ten days thereafter.

Sec. 843. The summons may be served by a sheriff or constable of the county, or by any elector of the county, not a party to the suit, and must be served and returned as prescribed in title five, part two, of this code.

Summons,
by whom and
how served
and returned

CHAPTER III.

OF PROVISIONAL REMEDIES IN JUSTICES' COURTS.

ARTICLE I. OF ARREST AND BAIL.

II. OF ATTACHMENT.

III. CLAIM AND DELIVERY OF PERSONAL PROPERTY.

ARTICLE I.

OF ARREST AND BAIL.

SECTION 847. Order of arrest and arrest of defendant.

848. Affidavit and undertaking for order of arrest.

849. A defendant arrested must be taken before the justice immediately.

850. The officer must give notice to the plaintiff of the arrest.

851. The officer must detain the defendant.

852. Defendant may demand trial immediately.

853. Adjournment on motion of defendant must be granted, when.

Sec. 847. (§ 544) An order to arrest the defendant may be indorsed on a summons issued by the justice, and the defendant may be arrested thereon by the sheriff

Order of
arrest and
arrest of
defendant.

or constable, at the time of serving the summons, and brought before the justice, and there detained until duly discharged, in the following cases :

1. In an action for the recovery of money or damages, on a cause of action arising upon contract, express or implied, when the defendant is about to depart from the state, with intent to defraud his creditors.

2. In an action for a fine or penalty, or for money or property embezzled or fraudulently misapplied, or converted to his own use by an attorney, factor, broker, agent or clerk, in the course of his employment as such, or by any other person in a fiduciary capacity.

3. When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought.

4. When the defendant has removed, concealed or disposed of his property, or is about to do so, with intent to defraud his creditors. But no female can be arrested in any action.

Affidavit and undertaking for order of arrest.

SEC. 848. (§ 545.) Before an order for an arrest can be made the party applying must prove to the satisfaction of the justice, by the affidavit of himself or some other person, the facts on which the application is founded. The plaintiff must also execute and deliver to the justice a written undertaking, with two or more sureties, to the effect that if the defendant recover judgment the plaintiff will pay to him all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which must be at least two hundred dollars.

A defendant arrested must be taken before the justice immediately

SEC. 849. (§ 546.) The defendant, immediately upon being arrested, must be taken to the office of the justice who made the order, and if he be absent or unable to try the action, or if it be made to appear to him by the affidavit of defendant, that he is a material witness in the action, the officer shall immediately take the defendant before the next justice of the city or township, who must take jurisdiction of the action, and proceed thereon, as if the summons had been issued and the order of arrest made by him.

Sec. 850. (§ 547.) The officer making the arrest must immediately give notice thereof to the plaintiff, or his attorney or agent, and indorse on the summons, and subscribe a certificate, stating the time of serving the same, the time of the arrest, and of his giving notice to the plaintiff.

The officer must give notice to the plaintiff of the arrest.

Sec. 851. (§ 548.) The officer making the arrest must keep the defendant in custody until duly discharged by order of the justice.

The officer must detain the defendant.

Sec. 852. (§ 549.) The defendant under arrest, on his appearance with the officer, may demand a trial immediately; and upon such demand being made, the trial cannot be delayed beyond three hours, except by the trial of another action pending at the time; or he may have an adjournment, and be discharged on giving bail, as provided in the next section. An adjournment at the request of the plaintiff, beyond three hours, discharges the defendant from arrest, but the action may proceed, notwithstanding; and the defendant is subject to arrest on the execution, in the same manner as if he had not been so discharged.

Defendant may demand trial immediately.

Sec. 853. (§ 550.) If the defendant on his appearance demand an adjournment, the same shall be granted, on condition that he execute and file with the justice an undertaking, with two or more sufficient sureties, to be approved by the justice, to the effect that he will render himself amenable to the process of the court during the pendency of the action, and such as may be issued to enforce the judgment therein; or that the sureties will pay to the plaintiff the amount of any judgment which he may recover in the action. On filing the undertaking specified in this section, the justice shall order the defendant to be discharged from custody.

Adjournment on motion of defendant must be granted, when.

ARTICLE II.

ATTACHMENT.

Section 857. Writ of attachment shall issue upon affidavit.

858. Undertaking on attachment must be required.

859. Writ of attachment, substance of. Officer may take an undertaking instead of levying.

860. Certain proceedings shall apply to all attachments in justices' courts.

Writ of attachment shall issue upon affidavit.

SEC. 857. (§ 552.) A writ to attach the property of the defendant must be issued by the justice at the time of the issuing of the summons or afterwards, on receiving an affidavit by or on behalf of the plaintiff, showing the same facts as are required to be shown by the affidavit specified in section five hundred and thirty-eight of this code.

Undertaking on attachment must be required.

SEC. 858. (§ 553.) Before issuing the writ, the justice must require a written undertaking on the part of the plaintiff, with two or more sufficient sureties, to the effect that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding three hundred dollars.

Writ of attachment, substance of.

SEC. 859. (§ 554.) The writ may be directed to the sheriff or any constable of the county, and must require him to attach and safely keep all the property of the defendant within his county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint, unless the defendant give him security, by the undertaking of two sufficient sureties, in an amount sufficient to satisfy such demand besides costs; in which case, to take such undertaking.

Officer may take an undertaking instead of levying.

Certain proceedings shall apply to all attachments in justices' courts.

SEC. 860. (§ 555.) The sections of this code, from section five hundred and forty-one to section five hundred and fifty-nine, both inclusive, are applicable to attachments issued in justices' courts, the word "constable" being substituted for the word "sheriff," whenever the writ is directed to a constable, and the word "justice" being substituted for the word "judge."

ARTICLE III.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

SECTION 863. How claim and delivery enforced.

How claim and delivery enforced.

SEC. 863. In an action to recover possession of personal property, the plaintiff may, at the time of issuing summons or at any time thereafter before answer, claim

the delivery of such property to him; and the sections of this code, from section five hundred and ten to section five hundred and twenty, both inclusive, are applicable to such claim when made in justices' courts, the powers therein given and duties imposed on sheriffs being extended to constables, and the word "justice" substituted for "judge."

CHAPTER IV.

PLEADINGS AND TRIAL.

SECTION 866. Pleadings in justices' courts.

867. Pleadings may be oral or in writing.

868. Pleadings, manner of presenting and form of.

869. Complaint, contents of.

870. Answer, contents of.

871. Statement of insufficient knowledge, etc., is deemed a denial.

872. Manner of pleading a written instrument.

873. If a copy of an instrument be filed, the signatures will be deemed admitted, unless denied under oath.

874. Demurrer to pleadings in justices' courts.

875. Amendment of pleadings.

876. Title to real estate cannot be questioned before a justice.
Such cases to be certified to the district court.

877. Change of venue in certain cases.

878. Adjournment on demand for a jury.

879. Adjournment not to exceed four months, for want of material testimony.

880. No continuance for more than ten days to be granted, unless upon filing undertaking.

881. Failure of either party to appear, effect of.

882. Trial by jury.

883. Challenges to jurors.

SEC. 866. (§ 570.) The pleadings in justices' courts are—

Pleadings
in justices'
courts.

1. The complaint by the plaintiff, stating the cause of action.

2. The answer by the defendant, stating the ground of the defence.

3. The demurrer.

SEC. 867. (§ 571.) The pleadings may be oral or in writing.

Pleadings
may be oral
or in writing

Pleadings,
manner of
presenting
and form of.

SEC. 868. (§ 572.) When the pleadings are oral, the substance of them must be entered by the justice in his docket; when in writing, they must be filed in his office, and a reference to them made in the docket. Pleadings are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is intended.

Complaint,
contents of.

SEC. 869. (§ 573.) The complaint must state in a plain and direct manner the facts constituting the cause of action.

Answer,
contents of.

SEC. 870. (§ 574.) The answer may contain a denial of any of the material facts stated in the complaint, which the defendant believes to be untrue, and also a statement, in a plain and direct manner, of any other facts constituting a defence or a counter claim, upon which an action might be brought by the defendant against the plaintiff in a justice's court.

Statement of
insufficient
knowledge,
etc., deemed
a denial.

SEC. 871. (§ 575.) A statement in an answer that a party has not sufficient knowledge or information in respect to a particular allegation in the previous pleading of the adverse party to form a belief, is deemed equivalent to a denial.

Manner of
pleading a
written
instrument.

SEC. 872. (§ 576.) When the cause of action or counter claim arises upon an account or instrument for the payment of money only, it is sufficient for the party to deliver a copy of the account or the original, or a copy of the instrument, to the court, and to state that there is due to him thereupon, from the adverse party, a specified sum, which he claims to recover or set off. The court may, at the time of the pleading, require that the original account or instrument be exhibited to the inspection of the adverse party, and a copy to be furnished; or, if it be not so exhibited and a copy furnished, may prohibit its being afterwards given in evidence.

If a copy of
an instru-
ment be
filed, the
signatures
will be
deemed
admitted,
unless de-
nied under
oath.

SEC. 873. (§ 577.) If the plaintiff annex to his complaint, or file with the justice at the time of issuing the summons, the original or a copy of the promissory note, bill of exchange, or other written obligation for the payment of money, upon which the action is brought, the

defendant is deemed to admit the genuineness of the signatures of the makers, indorsers or assignors thereof, unless he specifically deny the same in his answer, and verify the answer by his oath.

SEC. 874. (§ 578.) Either party may object to a pleading of his adversary, or to any part thereof, that it is not sufficiently explicit to enable him to understand it, or that it contains no cause of action or defence, although it be taken as true. If the court deem the objection well founded, it must order the pleading to be amended, and if the party refuse to amend, the defective pleading must be disregarded.

Demurrer
to pleadings
in justices'
courts.

SEC. 875. (§ 580.) The pleadings may be amended at any time before the trial, when by such amendment substantial justice will be promoted. If the amendment be made after the issue, and it be made to appear to the satisfaction of the court, by oath, that an adjournment is necessary to the adverse party in consequence of such amendment, an adjournment must be granted. The court may also, in its discretion, require, as a condition of an amendment, the payment of costs to the adverse party, to be fixed by the court, not exceeding twenty dollars; but such payment must not be required unless an adjournment is made necessary by the amendment.

Amendment
of pleadings.

SEC. 876. (§ 581.) The parties cannot give evidence upon any question which involves the title or possession of real property, or the legality of any tax, impost, assessment, toll or municipal fine, nor can any issue presenting such question be tried by the justice; and if it appear, from the plaintiff's own showing on the trial, or from the answer of the defendant, verified by his oath, that the determination of the action will necessarily involve the question of title or possession to real property, or the legality of any tax, impost, assessment, toll or municipal fine, the justice must suspend all further proceedings in the action and certify the pleadings, or if the pleadings be oral, a transcript of the same, from his docket to the district court of the county; and from the time of filing such pleadings or transcript with the county clerk, the district court shall have over the action the same jurisdiction as if it had been commenced therein.

Title to real
estate can
not be ques-
tioned before
a justice.

Such cases
to be certi-
fied to the
district court

Change of
venue in
certain cases

SEC. 877. (§ 582.) If, at any time before the trial, it appear to the satisfaction of the justice before whom the action is brought, by affidavit of either party, that such justice is a material witness for either party, or if either party make affidavit that he has reason to believe and does believe, that he cannot have a fair and impartial trial before such justice, by reason of the interest, prejudice or bias of the justice, the action may be transferred to some other justice of the same or a neighboring township; and in case a jury be demanded, and affidavit of either party is made that he cannot have a fair and impartial trial, on account of the bias or prejudice of the citizens of the township against him, the action may be transferred to some other justice of the peace in the county; but only one transfer can be allowed to either party. The justice to whom an action may be transferred by the provisions of this section has the same jurisdiction over the action as if it had been originally commenced before him. The justice ordering the transfer of the action to another justice must immediately transmit to the latter, on payment by the party applying of all the costs that have accrued, all the papers in the action, together with a certified transcript from his docket of the proceedings therein. The justice to whom the case is transferred must issue a notice, stating the time and place, when and where, the trial will take place, which notice must be served upon the parties by any officer authorized to serve process in a justice's court, or by any person specially deputized by the justice for that purpose, at least one day before the trial.

Adjourn-
ment on
demand for
a jury.

SEC. 878. Upon the return day of the summons, if a jury be required, or, if the justice be actually engaged in other official business, he may adjourn the trial without the consent of either party, as follows:

1. When a party, who is not a resident of the county is in attendance, the adjournment not to exceed twenty-four hours; when the defendant, in attendance, is under arrest, the adjournment not to exceed three hours.

2. In other cases, not to exceed five days.

Adjourn-
ment not to
exceed four
months, for
want of ma-
terial testi-
mony.

SEC. 879. (§ 583.) The trial may be adjourned by consent, or upon application of either party, without the

consent of the other, for a period not exceeding four months from the return day of the summons, as follows :

1. The party asking the adjournment must, if required by his adversary, prove, by his own oath or otherwise, that he cannot, for want of material testimony, which he expects to procure, safely proceed to trial, and show in what respect the testimony expected is material, and that he has used due diligence to procure it, and has been unable to do so.

2. The party asking the adjournment must also, if required by the adverse party, consent that the testimony of any witness of such adverse party, who is in attendance, be then taken by deposition before the justice, which must accordingly be done, and the testimony so taken may be read on the trial, with the same effect, and subject to the same objections, as if the witness were produced ; but such objections must be made at the time of taking the deposition.

3. The court may also require the moving party to state, upon affidavit, the evidence which he expects to obtain, and if the adverse party thereupon admit that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial must not be postponed.

SEC. 880. (§ 585) No adjournment can be granted for a period longer than ten days, upon the application of either party, except upon condition that such party file an undertaking, with sureties, to be approved by the justice, to the effect that they will pay to the opposite party the amount of any judgment which may be recovered against the party applying.

No continuance for more than ten days to be granted, unless upon filing undertaking.

SEC. 881. (§ 586.) If either party fails to appear at the time fixed for trial, or at the time to which the trial has been adjourned, the trial may proceed at the request of the adverse party, and judgment must be rendered in conformity with the pleadings and proofs.

Failure of either party to appear, effect of.

SEC. 882. (§ 587.) A trial by jury may be demanded at the time of joining issue ; and shall be deemed waived if neither party then demand it. When demanded, the

Trial by jury

trial of the case must be adjourned until a time and place fixed for the return of the jury. If neither party desire an adjournment, the time and place must be determined by the justice, and must be on the same day, or within the next two days.

Challenges
to jurors.

SEC. 888. (§ 590.) Either party may challenge the jurors. The challenges are either peremptory or for cause. Each party is entitled to three peremptory challenges. Either party may challenge for cause on any grounds set forth in section six hundred and two. Challenges for cause must be tried by the justice.

CHAPTER V.

NEW TRIALS.

SECTION 888. A new trial may be granted, when.

889. Application for new trial.

A new trial
may be
granted,
when.

SEC. 888. (§ 622.) A new trial may be granted by the justice, on motion, within ten days after the entry of the judgment, for any one of the following causes:

1. Accident or surprise, which ordinary prudence could not have guarded against.
2. Excessive damages, appearing to have been given under the influence of passion.
3. Insufficiency of the evidence to justify the verdict or other decision.
4. Newly discovered evidence material for the party making the application, which he could not with reasonable diligence have discovered and produced at the time.

Application
for new trial.

SEC. 889. (§ 623.) The application must be made upon affidavit and notice. The affidavit must be filed with the justice, with a statement of the grounds upon which the party intends to rely. The adverse party may use counter affidavits on the motion, provided they be filed one day previous to the hearing of the motion.

CHAPTER VI.

JUDGMENT AND EXECUTION.

SECTION 892. Judgment of dismissal entered in certain cases without prejudice.

893. Judgment for plaintiff by default.

894. Upon issue joined, the justice shall try the cause and render judgment.

895. Entry of judgment, time and manner of.

896. If the sum found due exceeds the jurisdiction of the justice, the excess may be remitted.

897. Offer to compromise before trial.

898. Judgment when the defendant is subject to arrest.

899. Costs shall be added to the verdict.

900. Execution issued by the justice, except when it is to run out of the county. Judgment liens, how created.

901. Execution may issue at any time within five years.

902. Execution, contents of.

903. Duty of officer receiving execution. Supplementary proceedings.

SEC. 892. (§ 591.) Judgment that the action be dismissed, without prejudice to a new action, may be entered with costs, in the following cases :

Judgment of dismissal entered in certain cases without prejudice.

1. When the plaintiff voluntarily dismisses the action before it is finally submitted.

2. When he fails to appear at the time specified in the summons, or upon adjournment, or within one hour thereafter.

3. When it is objected at the trial, and appears by the evidence, that the action is brought in the wrong county, or township, or city ; but if the objection be taken and overruled, it is cause only of reversal on appeal, and does not otherwise invalidate the judgment ; if not taken at the trial, it is waived.

SEC. 893. (§ 592.) When the defendant fails to appear and answer, judgment must be rendered for the plaintiff, as follows :

Judgment for plaintiff by default.

1. When the original or a copy of the account, note, bill, or other obligation upon which the action is brought, was filed with the justice at the time the summons was issued, judgment must be given without further evidence, for the sum specified in the summons.

2. In other cases, the justice must hear the evidence of the plaintiff, and render judgment for such sums only as

appear by the evidence to be just; but in no case exceeding the amount specified in the summons.

Upon issue joined, the justice shall try the cause and render judgment.

SEC. 894. (§ 593.) Upon issue joined, if a jury trial is not demanded, the justice must hear the evidence, and decide all questions of fact and of law, and render judgment accordingly.

Entry of judgment, time and manner of

SEC. 895. (§ 594.) Upon a verdict, the justice must immediately render judgment accordingly. When the trial is by the justice, judgment must be entered immediately after the close of the trial, if the defendant has been arrested and is still in custody; in other cases it must be entered within four days after the close of the trial. If the action is on a contract against two or more defendants, and the summons is served on one or more, but not on all, the judgment must be entered up only against those who were served, or have voluntarily appeared, if the contract be a several or a joint and several contract; but if the contract be a joint contract only, the judgment must be entered up against all the defendants, but can only be enforced against the joint property of all, and the individual property of the defendants served, or who have voluntarily appeared in the action. In an action on a contract or obligation in writing for the direct payment of money, made payable in a specified kind of money or currency, judgment for the plaintiff, whether the same be by default or after verdict, may follow the contract or obligation, and be made payable in the kind of money or currency specified therein.

If the sum found due exceeds the jurisdiction of the justice, the excess may be remitted.

SEC. 896. (§ 595.) When the amount found due to either party exceeds the sum for which the justice is authorized to enter judgment, such party may remit the excess, and judgment may be rendered for the residue.

Offer to compromise before trial.

SEC. 897. (§ 596.) If the defendant, at any time before the trial, offer in writing to allow judgment to be taken against him for a specified sum, the plaintiff may immediately have judgment therefor, with the costs then accrued; but if he do not accept such offer before the trial, and fail to recover in the action a sum equal to the offer, he cannot recover costs, but costs shall be adjudged against him, and if he recover, deducted from his recov-

ery. But the offer and failure to accept it cannot be given in evidence, nor affect the recovery otherwise than as to costs.

SEC. 898. (§ 597.) When a judgment is rendered in a case where the defendant is subject to arrest and imprisonment thereon, it must be so stated in the judgment and entered in the docket.

Judgment when the defendant is subject to arrest.

SEC. 899. (§ 598.) When the prevailing party is entitled to costs, the justice must add their amount to the verdict; or in case of a failure of the plaintiff to recover, or in case of a dismissal of the action, must enter up judgment in favor of the defendant for the amount of such costs.

Costs shall be added to the verdict.

SEC. 900. (§ 599.) The justice, on demand of the party in whose favor judgment is rendered, must give him a transcript thereof, which may be filed and docketed in the office of the clerk of the county where the judgment was rendered. The time of the receipt of the transcript by the county clerk must be noted by him thereon, and entered in the docket; and from that time executions may be issued by the county clerk on such judgments, to the sheriff of any other county of the state, in the same manner as upon judgments recovered in the courts of record. All process upon judgments recovered in justices' courts, to be executed within the same county, must be issued by the justice or his successor in office. No judgment rendered by a justice of the peace creates any lien upon any lands of the defendant, unless a transcript of such judgment, certified by the justice, is filed and recorded in the office of the recorder. When such transcript is to be filed in any other county than that in which the justice resides, such transcript must be accompanied with the certificate of the county clerk as to the official character of the justice. When so filed and recorded in the office of the recorder for any county, such judgment constitutes a lien upon and binds the lands and tenements of the judgment debtor, situated in the county where such transcript may be filed and recorded, in favor of such judgment creditor, as if such judgment had been rendered in the district court of such county.

Execution issued by the justice, except when it is to run out of the county.

Judgment liens, how created.

Execution
may issue at
any time
within five
years.

SEC. 901. (§ 600.) Execution for the enforcement of a judgment in a justice's court may be issued, on the application of the party entitled thereto, at any time within five years from the entry of judgment.

Execution,
contents of

SEC. 902. (§ 601.) The execution, when issued by a justice, must be directed to the sheriff or to a constable of the county, subscribed by the justice by whom the judgment was rendered, or by his successor in office, and bear date the day of its delivery to the officer to be executed. It must intelligibly refer to the judgment, by stating the names of the parties, and the name of the justice before whom, and of the county and the township or city where, and the time when, it was rendered; the amount of judgment, if it be for money; and, if less than the whole is due, the true amount due thereon. It must contain, in like cases, similar directions to the sheriff or constable, as required by the provisions of title nine, part two, of this code, in an execution to the sheriff.

Duty of offi-
cer receiving
execution.

SEC. 903. (§ 602.) The sheriff or constable to whom the execution is directed shall proceed to execute the same in the same manner as the sheriff is required by the provisions of title nine, part two, of this code, to proceed upon executions directed to him; and the constable, when the execution is directed to him, is vested for that purpose with all the powers of the sheriff. After issue of an execution, and either before or after its return (if the same be returned unsatisfied, either in whole or in part), the judgment creditor is entitled to an order from the justice, requiring the judgment debtor to attend at a time to be designated in the order, and answer concerning his property before such justice; and the attendance of such debtor may be enforced by the justice. On his attendance, such debtor may be examined under oath concerning his property; and any person alleged to have in his hands property, moneys, effects or credits of the judgment debtor may also be required to attend and be examined; and the justice may order any property in the hands of the judgment debtor or any other person, not exempt from execution, belonging to such debtor, to be applied towards the satisfaction of the judgment; and the justice may enforce such order by imprisonment until

Supplement-
ary proceed-
ings.

complied with; but no judgment debtor or other person can be required to attend before the justice out of the county in which he resides.

CHAPTER VII.

GENERAL PROVISIONS RELATING TO JUSTICES' COURTS.

SECTION 907. What provisions applicable to justices' courts.

908. Costs.

909. May require security for costs.

910. Money collected by constable or sheriff to be paid to the justice.

911. Justice's docket, contents of.

912. Entries therein primary evidence of the facts.

913. An index to the docket must be kept.

914. Dockets must be delivered by justice to his successor or county clerk.

915. A justice may issue execution or other process, upon the docket of his predecessor.

916. Successor of a justice, who shall be deemed.

917. If two justices might be deemed successors, the county judge shall designate one.

918. Blanks must be filled in all papers issued by a justice, except subpoenas.

919. In case of disability of a justice, another justice may attend on his behalf.

920. A constable, after the expiration of his term, may execute papers previously commenced.

921. Contempts a justice may punish for.

922. Proceedings and punishments for contempts.

923. The conviction must be entered in the docket.

924. Justices may issue subpoenas and final process to any part of the county.

SEC. 907. Justices' courts being courts of peculiar and limited jurisdiction, only those provisions of this code which are, in their nature, applicable to the organization, powers and course of proceeding in justices' courts, and in respect to which no special provision is made in this title, are applicable to justices' courts and the proceedings therein.

What provisions applicable to justices' courts.

SEC. 908. The prevailing party in justices' courts is entitled to costs.

Costs.

May require
security for
costs.

SEC. 909. (§ 634.) Justices may, in all cases, require a deposit of money or an undertaking, as security for costs of court, before issuing a summons.

Money
collected by
constable or
sheriff to be
paid to the
justice.

SEC. 910. (§ 633.) Justices of the peace must receive from the sheriff or constables of their county, all moneys collected on any process or order issued by their courts respectively, and all moneys paid to them in their official capacity, and must pay the same over to the parties entitled or authorized to receive them, without delay.

Justice's
docket,
contents of.

SEC. 911. (§ 604.) Every justice must keep a book, denominated a "docket," in which he must enter—

1. The title of every action or proceeding.
2. The object of the action or proceeding, and if a sum of money be claimed, the amount of the demand.
3. The date of the summons, and the time of its return; and if an order to arrest the defendant be made, or a writ of attachment be issued, a statement of these facts.
4. The time when the parties, or either of them, appear, or their non-appearance, if default be made; a minute of the pleadings and motions; if in writing, referring to them; if not in writing, a concise statement of the material parts of the pleadings, and of all motions made during the trial by either party, and his decisions thereon.
5. Every adjournment, stating on whose application, whether on oath, evidence or consent, and to what time.
6. The demand for a trial by jury, when the same is made, and by whom made, the order for the jury, and the time appointed for the trial and return of the jury.
7. The names of the jury who appear and are sworn, the names of all witnesses sworn, and at whose request.
8. The verdict of the jury, and when received; if the jury disagree and are discharged, the fact of such disagreement and discharge.
9. The judgment of the court, specifying the costs included and the time when rendered.
10. The issuing of the execution, when issued and to whom; the renewals thereof, if any, and when made, and a statement of any money paid to the justice, and when and by whom.
11. The receipt of a notice of appeal, if any be given, and of the appeal bond, if any be filed.

SEC. 912. (§ 605.) The several particulars of the last section specified must be entered under the title of the action to which they relate, and at the time when they occur. Such entries in a justice's docket, or a transcript thereof, certified by the justice or his successor in office, are primary evidence to prove the facts so stated therein.

Entries therein primary evidence of the facts.

SEC. 913. (§ 606.) A justice must keep an alphabetical index to his docket, in which must be entered the names of the parties to each judgment, with a reference to the page of entry. The names of the plaintiffs must be entered in the index, in the alphabetical order of the first letter of the family name.

An index to the docket must be kept

SEC. 914. (§ 607.) Every justice of the peace, upon the expiration of his term of office, must deposit with his successor his official dockets and all papers filed in his office, as well his own as those of his predecessors, or any other which may be in his custody to be kept as public records. If the office of a justice become vacant by his death or removal from the township or city, or otherwise, before his successor is elected and qualified, the docket and papers in possession of such justice must be deposited in the office of some other justice in the township, to be by him delivered to the successor of such justice; and while in his possession, he may issue execution on a judgment there entered and unsatisfied, may make all orders in proceedings supplemental to execution, and may file notices and undertakings on appeal, and may take the justification of the sureties, and on the filing of the undertaking on appeal, order stay of execution, in the same manner and with the same effect as the justice by whom the judgment was entered might have done. If there be no other justice in the township, then the docket and papers of such justice must be deposited in the office of the county clerk of the county, to be by him delivered to the successor in office of the justice.

Dockets must be delivered by justice to his successor or county clerk.

SEC. 915. (§ 608.) Any justice with whom the docket of his predecessor is deposited may have and exercise over all actions and proceedings entered in the docket of

A justice may issue execution or other process upon the docket of his predecessor.

his predecessor, the same jurisdiction as if originally commenced before him. In case of the creation of a new county, or the change of the boundary between two counties, any justice into whose hands the docket of a justice formerly acting as such within the same territory may come, is, for the purposes of this section, considered the successor of such former justice.

Successor of a justice, who shall be deemed.

SEC. 916. (§ 609.) The justice elected to fill a vacancy is deemed the successor of the justice whose office became vacant before the expiration of a full term. When a full term expires, the same or another person elected to take office in the same township or city, from that time is deemed the successor.

If two justices might be deemed successors, the county judge shall designate one.

SEC. 917. (§ 610) When two or more justices are equally entitled, under the last section, to be deemed the successors in office of the justice, the county judge must, by a certificate subscribed by him and filed in the office of the county clerk, designate which justice is the successor of a justice going out of office, or whose office has become vacant.

Blanks must be filled in all papers issued by a justice, except subpoenas.

SEC. 918. (§ 611.) The summons, execution and every other paper made or issued by a justice, except a subpoena, must be issued without a blank left to be filled by another, otherwise it is void.

In case of disability of a justice, another justice may attend on his behalf

SEC. 919. (§ 612.) In case of the sickness or other disability, or necessary absence of a justice on a return of a summons, or at the time appointed for a trial, another justice of the same township or city may, at his request, attend in his behalf, and thereupon is vested with the power, for the time being, of the justice before whom the summons was returnable. In that case, the proper entry of the proceedings before the attending justice, subscribed by him, must be made in the docket of the justice before whom the summons was returnable. If the case is adjourned, the justice before whom the summons was returnable may resume jurisdiction.

A constable, after the expiration of his term, may execute papers previously commenced.

SEC. 920. (§ 615.) A constable, notwithstanding the expiration of his term of office, may proceed and complete the execution of all final process which he has be-

gun to execute, in the same manner as if he still continued in office, and his sureties are liable to the same extent.

SEC. 921. (§ 616.) A justice may punish as for contempt, persons guilty of the following acts, and no other: Contempts a justice may punish for.

1. Disorderly, contemptuous or insolent behavior towards the justice while holding the court, tending to interrupt the due course of a trial, or other judicial proceeding.

2. A breach of the peace, boisterous conduct or violent disturbance in the presence of the justice, or in the immediate vicinity of the court held by him, tending to interrupt the due course of a trial or other judicial proceeding.

3. Disobedience or resistance to the execution of a lawful order or process, made or issued by him.

4. Disobedience to a subpoena duly served, or refusing to be sworn or answer as a witness.

5. Rescuing any person or property in the custody of any officer, by virtue of an order or process of the court held by him.

SEC. 922. (§ 617.) When a contempt is committed in the immediate view and presence of the justice, it may be punished summarily, for which an order must be made reciting the facts, as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed. When the contempt is not committed in the immediate view and presence of the justice, a warrant of arrest may be issued by such justice, on which the person so guilty may be arrested and brought before the justice immediately, when an opportunity to be heard in his defence or excuse must be given. The justice may, thereupon, discharge him, or may convict him of the offence. A justice may punish for contempts by fine or imprisonment, or both; such fine not to exceed in any case one hundred dollars, and such imprisonment one day. Proceedings and punishments for contempts.

SEC. 923. (§ 618.) The conviction, specifying particularly the offence and the judgment thereon, must be entered by the justice in his docket. The conviction must be entered in the docket.

Justices may
issue subpoenas and final
process to
any part of
the county.

SEC. 924. (§ 619.) Justices of the peace may issue subpoenas in any action or proceeding in the courts held by them, and final process on any judgment recovered therein, to any part of the county. A justice of the peace may issue summons to any person, a resident of the proper township, to appear before him, at his office, to act as interpreter in any action or proceeding in the courts held by him. Such summons must be served and returned in like manner as a subpoena issued by a justice. Any person so summoned, for a failure to attend at the time and place named in the summons, is guilty of a contempt, and may be punished accordingly.

TITLE XII.

PROCEEDINGS IN CIVIL ACTIONS IN POLICE COURTS.

SECTION 929. How commenced.

930. Summons must issue on filing complaint.

931. Defendant may plead orally or in writing.

932. Trial by jury, when defendant is entitled to.

933. Proceedings to be conducted as in justices' courts.

How commenced.

SEC. 929. (§ 636.) Civil actions in police courts are commenced by filing a complaint, setting forth the violation of the ordinance complained of, with such particulars of time, place and manner of violation as to enable the defendant to understand distinctly the character of the violation complained of, and to answer the complaint. The ordinance may be referred to by its title. The complaint must be verified by the oath of the party complaining, or of his attorney or agent.

Summons
must issue
on filing
complaint.

SEC. 930. (§ 637.) Immediately after filing the complaint a summons must be issued, directed to the defendant, and returnable either immediately or at any time designated therein, not exceeding four days from the date of its issuing.

Defendant
may plead
orally or in
writing.

SEC. 931. (§ 638.) On the return of the summons the defendant may answer the complaint. The answer may be oral or in writing, and immediately thereafter

the case must be tried, unless, for good cause shown, an adjournment is granted.

SEC. 932. (§ 639.) In all actions for violation of an ordinance, where the fine, forfeiture or penalty imposed by the ordinance is less than fifty dollars, the trial must be by the court. In actions where the fine, forfeiture or penalty imposed by the ordinance is over fifty dollars, the defendant is entitled to a trial by jury.

Trial by jury, when defendant is entitled to.

SEC. 933. All proceeding in civil actions in police courts must, except as in this title otherwise provided, be conducted in the same manner as civil actions in justices' courts.

Proceedings to be conducted as in justices' courts.

TITLE XIII.

OF APPEALS IN CIVIL ACTIONS.

CHAPTER I. *Appeals in general.*

- II. *Appeals from district courts.*
- III. *Appeals from county courts.*
- IV. *Appeals from probate courts.*
- V. *Appeals to county courts.*

CHAPTER I.

APPEALS IN GENERAL.

SECTION 936. Judgment and orders may be reviewed.

937. Orders made out of court, without notice, may be reviewed by the judge.

938. Party aggrieved may appeal. Names of parties.

939. Within what time appeal may be taken.

940. Appeal, how taken.

941. Appellant must file undertaking within five days.

942. Undertaking on appeal from a money judgment.

943. Appeal from a judgment for delivery of documents.

944. Appeal from a judgment directing the execution of a conveyance, etc.

945. Undertaking on appeal concerning real property.

946. Stay of proceedings. The security on appeal may be limited in the case of an execution, etc.

- SECTION 947.** Undertaking may be in one instrument or several.
948. Justification of sureties on undertaking on appeal.
949. Undertakings in cases not specified.
950. What papers to be used on an appeal from the judgment.
951. What papers used on appeals from orders, except orders granting or refusing new trials.
952. What papers to be used on an appeal from an order granting or refusing a new trial.
953. Copies and undertakings, how certified.
954. When appeal may be dismissed. When not.
955. What may be reviewed on an appeal from judgment.
956. Remedial powers of an appellate court.
957. On judgment on appeal, remittitur must be certified to the clerk of the court below.
958. Provisions of this chapter not applicable to appeals to county courts.

Judgment
and orders
may be
reviewed.

SEC. 936. (§ 333) A judgment or order in a civil action, except when expressly made final by this code, may be reviewed as prescribed in this title, and not otherwise.

Orders made
out of court,
without
notice, may
be reviewed
by the judge.

SEC. 937. (§ 334.) An order made out of court, without notice to the adverse party, may be vacated or modified, without notice, by the judge who made it; or may be vacated or modified on notice, in the manner in which other motions are made.

Party
aggrieved
may appeal.
Names of
parties.

SEC. 938. (§ 335.) Any party aggrieved may appeal in the cases prescribed in this title. The party appealing is known as the appellant, and the adverse party as the respondent.

Within what
time appeal
may be taken

SEC. 939. (§ 336.) An appeal may be taken :

1. From a final judgment in an action or special proceeding commenced in the court in which the same is rendered, within one year after the entry of judgment. But an exception to the decision or verdict, on the ground that it is not supported by the evidence, cannot be reviewed on an appeal from the judgment, unless the appeal is taken within sixty days after the rendition of the judgment.

2. From a judgment rendered on an appeal from an inferior court, within ninety days after the entry of such judgment.

3. From an order granting or refusing a new trial; from an order granting or dissolving an injunction; from an order refusing to grant or dissolve an injunction; from

an order dissolving or refusing to dissolve an attachment ; from an order granting or refusing to grant a change of the place of trial ; from any special order made after final judgment, and from an interlocutory judgment in actions for partition of real property, within sixty days after the order or interlocutory judgment is made and entered in the minutes of the court or filed with the clerk.

SEC. 940. (§ 337.) The appeal is taken by filing with the clerk of the court, with whom the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a copy of the notice upon the adverse party or his attorney.

Appeal, how taken.

SEC. 941. (§ 348) To render an appeal effectual for any purpose, a written undertaking must be executed on the part of the appellant, by at least two sureties, to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, not exceeding three hundred dollars ; or that sum must be deposited with the clerk with whom the judgment or order was entered, to abide the event of the appeal. Such undertaking must be filed or such deposit made with the clerk within five days after the notice of appeal is filed.

Appellant must file undertaking within five days.

SEC. 942. (§ 349.) If the appeal be from a judgment or order directing the payment of money, it does not stay the execution of the judgment or order, unless a written undertaking be executed on the part of the appellant, by two or more sureties, to the effect that they are bound in double the amount named in the judgment or order ; that if the judgment or order appealed from, or any part thereof, be affirmed, the appellant will pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the judgment or order is affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal. When the judgment or order appealed from is made payable in a specified kind of money or currency, the undertaking required by this section must be drawn and made payable in the same kind of money or currency specified in such judgment.

Undertaking on appeal from a money judgment.

Appeal from
a judgment
for delivery
of documents

SEC. 943. (§ 350.) If the judgment or order appealed from direct the assignment or delivery of documents or personal property, the execution of the judgment or order cannot be stayed by appeal, unless the things required to be assigned or delivered be placed in the custody of such officer or receiver as the court may appoint; or unless an undertaking be entered into on the part of the appellant, with at least two sureties, and in such amount as the court, or the judge thereof, or county judge, may direct, to the effect that the appellant will obey the order of the appellate court upon the appeal.

Appeal from
a judgment
directing the
execution of
a convey-
ance, etc.

SEC. 944. (§ 351.) If the judgment or order appealed from direct the execution of a conveyance or other instrument, the execution of the judgment or order cannot be stayed by the appeal until the instrument is executed and deposited with the clerk with whom the judgment or order is entered, to abide the judgment of the appellate court.

Undertaking
on appeal
concerning
real property

SEC. 945. (§ 352.) If the judgment or order appealed from direct the sale or delivery of possession of real property, the execution of the same cannot be stayed, unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that during the possession of such property by the appellant, he will not commit, or suffer to be committed, any waste thereon, and that if the judgment be affirmed, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, pursuant to the judgment or order, not exceeding a sum to be fixed by the judge of the court by which the judgment was rendered or order made, and which must be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of such deficiency.

Stay of pro-
ceedings.

SEC. 946. (§ 353.) Whenever an appeal is perfected, as provided in the preceding sections of this chapter, it stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein; but the court below may proceed upon any other matter embraced in the action and not affected

by the order appealed from. And the court below may, in its discretion, dispense with or limit the security required by this chapter, when the appellant is an executor, administrator, trustee or other person acting in another's right. An appeal from an order dissolving an attachment does not continue in force an attachment, unless an undertaking be executed and filed on the part of the appellant, by at least two sureties, in double the amount of the debt claimed by him, that the appellant will pay all costs and damages which the respondent may sustain by reason of the attachment, in case the order of the court below be sustained; and unless, also, notice of the appeal be given within five days after the entry of the order appealed from, and such appeal be perfected, and the undertaking in this section mentioned be filed within five days thereafter.

The security on appeal may be limited in the case of an execution, etc.

SEC. 947. (§ 354.) The undertakings prescribed by sections nine hundred and forty-one, nine hundred and forty-two, nine hundred and forty-three, and nine hundred and forty-five, may be in one instrument or several, at the option of the appellant.

Undertaking may be in one instrument or several.

SEC. 948. (§ 355.) The adverse party may except to the sufficiency of the sureties to the undertaking or undertakings mentioned in sections nine hundred and forty-one, nine hundred and forty-two, nine hundred and forty-three, and nine hundred and forty-five, at any time within thirty days after the filing of such undertaking; and unless they or other sureties, within twenty days after the appellant has been served with notice of such exception, justify before a judge of the court below, a county judge or county clerk, upon five days notice to the appellant, execution of the judgment or decree appealed from is no longer stayed; and in all cases where an undertaking is required on appeal by the provisions of this title, a deposit in the court below of the amount of the judgment appealed from, and three hundred dollars in addition, is equivalent to filing the undertaking; and in all cases the undertaking or deposit may be waived by the written consent of the respondent.

Justification of sureties on undertaking on appeal.

Undertak-
ings in cases
not specified.

SEC. 949. (§ 356.) In cases not provided for in sections nine hundred and forty-two, nine hundred and forty-three, nine hundred and forty-four, and nine hundred and forty-five, the perfecting of an appeal by giving the undertaking or making the deposit mentioned in section nine hundred and forty-one, stays proceedings in the court below upon the judgment or order appealed from, except where it directs the sale of perishable property; in which case, the court below may order the property to be sold and the proceeds thereof to be deposited to abide the judgment of the appellate court.

What papers
to be used on
an appeal
from the
judgment.

SEC. 950. (§ 346.) On an appeal from a final judgment, the appellant must furnish the court with a copy of the notice of appeal, the pleadings, or amended pleadings, which form the issues tried in the case, the judgment, bills of exception and such other parts of the judgment roll, and no more, as are necessary to present or explain the points relied on.

What papers
used on
appeals from
orders, ex-
cept orders
granting or
refusing new
trials.

SEC. 951. (§ 346.) On appeal from a judgment rendered on an appeal, or from an order, except an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, the judgment or order appealed from and of the bill of exceptions relating thereto.

What papers
to be used on
an appeal
from an or-
der granting
or refusing a
new trial.

SEC. 952. On an appeal from an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of motion for new trial and of appeal, and of the statement provided for in section six hundred and sixty-one, and of all the pleadings, papers, bills of exception and affidavits referred to and made part of such statement.

Copies and
undertak-
ings, how
certified.

SEC. 953. (§ 346.) The copies provided for in the last three sections must be certified to be correct by the clerk or the attorneys, and must be accompanied with a certificate of the clerk that an undertaking on appeal, in due form, has been properly filed.

When appeal
may be
dismissed.
When not.

SEC. 954. (§ 346.) If the appellant fails to furnish the requisite papers, the appeal may be dismissed; but no appeal can be dismissed for insufficiency of the notice of

appeal or undertaking thereon, if a good and sufficient undertaking, approved by a justice of the supreme court, be filed in the supreme court before the hearing upon motion to dismiss the appeal.

SEC. 955. Upon an appeal from a judgment, the court may review the verdict or decision, if excepted to, or any intermediate order, if excepted to, which involves the merits or necessarily affects the judgment.

What may be reviewed on an appeal from judgment.

SEC. 956. When the judgment or order is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment or order; and when it appears to the appellate court that the appeal was made for delay, it may add to the costs such damages as may be just.

Remedial powers of an appellate court.

SEC. 957. (§ 358.) When judgment is rendered upon the appeal, it must be certified by the clerk of the supreme court to the clerk with whom the judgment roll is filed, or the order appealed from is entered. In cases of appeal from the judgment, the clerk with whom the roll is filed must attach the certificate to the judgment roll, and enter a minute of the judgment of the supreme court on the docket, against the original entry. In cases of appeal from an order, the clerk must enter at length in the records of the court the certificate received, and minute against the entry of the order appealed from, a reference to the certificate, with a brief statement that such order has been affirmed, reversed or modified by the supreme court on appeal.

On judgment on appeal, remittitur must be certified to the clerk of the court below.

SEC. 958. The provisions of this chapter do not apply to appeals to county courts.

Provisions of this chapter not applicable to appeals to county courts.

CHAPTER II.

APPEALS FROM DISTRICT COURTS.

SECTION 963. When an appeal may be taken.

SEC. 963. (§ 347.) An appeal may be taken to the supreme court, from the district courts, in the following cases :

When an appeal may be taken.

1. From a final judgment entered in an action or special proceeding commenced in those courts, or brought into those courts from other courts.

2. From an order granting or refusing a new trial; from an order granting or dissolving an injunction; from an order refusing to grant or dissolve an injunction; from an order dissolving, or refusing to dissolve, an attachment; from an order changing, or refusing to change, the place of trial; from any special order made after final judgment, and from such interlocutory judgment in actions for partition as determines the rights and interests of the respective parties, and directs partition to be made.

CHAPTER III.

APPEALS FROM COUNTY COURTS.

SECTION 966. When may be taken.

When may
be taken.

SEC. 966. (§ 359.) An appeal may be taken to the supreme court, from the county courts, in the following cases:

1. From a final judgment in an action of forcible entry and detainer; in an action to prevent or abate a nuisance; in a proceeding in insolvency; and in any special proceeding.

2. From an order granting or refusing a new trial; from an order granting or dissolving, or an order refusing to grant or dissolve, an injunction; from an order changing, or refusing to change, the place of trial; and from any special order made after final judgment in the cases in this section before enumerated.

CHAPTER IV.

APPEALS FROM PROBATE COURTS.

SECTION 969. When may be taken.

970. Executors and administrators not required to give undertaking on appeal.

971. Acts of acting administrator, etc., not invalidated by reversal of order appointing him.

SEC. 969. An appeal may be taken to the supreme court, from a judgment or order of the probate court— When may be taken.

1. Granting or revoking letters testamentary, or of administration or of guardianship.

2. Admitting, or refusing to admit, a will to probate.

3. Against or in favor of the validity of a will, or revoking the probate thereof.

4. Against or in favor of setting apart property, or making an allowance for a widow or child.

5. Against or in favor of directing the sale or conveyance of real property.

6. Settling an account of an executor or administrator, or guardian.

7. Refusing, declaring, allowing or directing the payment of a debt, claim, legacy or distributive share.

SEC. 970. When an executor or administrator who has given an official undertaking appeals from a judgment or order of the probate court made in the proceedings had upon the estate of which he is administrator or executor, his official undertaking stands in the place of an undertaking on appeal, and the sureties therein are liable as on such undertaking Executors and administrators not required to give undertaking on appeal.

SEC. 971. When the order or decree appointing an executor or administrator, or guardian, is reversed on appeal, all lawful acts in administration upon the estate performed by such executor or administrator, or guardian, if he has qualified, are as valid as if such order or decree had been affirmed. Acts of acting administrator, etc., not invalidated by reversal of order appointing him

CHAPTER V.

APPEALS TO COUNTY COURTS.

SECTION 974. Appeal from judgment of justices' or police courts.

975. Party appealing on questions of law alone must prepare a statement. Settlement of statement.

976. If the appeal be upon questions of fact, or of law and fact, no statement need be made.

977. Upon the appeal, the justice must transmit the case to the county court.

978. Undertaking on appeal. Justification of sureties.

979. On filing undertaking, execution must be stayed.

980. Miscellaneous provisions on trials in county courts.

Appeal from
judgment of
justices' or
police courts.

Sec. 974. (§ 624.) Any party dissatisfied with a judgment rendered in a civil action in a police or justice's court, may appeal therefrom to the county court of the county, at any time within thirty days after the rendition of the judgment. The appeal is taken by filing a notice of appeal with the justice or judge, and serving a copy on the adverse party. The notice must state whether the appeal is taken from the whole or a part of the judgment, and if from a part, what part, and whether the appeal is taken on questions of law or fact, or both.

Party ap-
pealing on
questions of
law alone
must prepare
a statement.

Sec. 975. (§ 625.) When a party appeals to the county court on questions of law alone, he must, within ten days from the rendition of judgment, prepare a statement of the case and file the same with the justice or judge. The statement must contain the grounds upon which the party intends to rely on the appeal, and so much of the evidence as may be necessary to explain the grounds, and no more. Within ten days after he receives notice that the statement is filed, the adverse party, if dissatisfied with the same, may file amendments. The proposed statement and amendments must be settled by the justice or judge, and if no amendments be filed, the original statement stands as adopted. The statement thus adopted or as settled by the justice or judge, with a copy of the docket of the justice or judge, and all motions filed with him by the parties during the trial, and the notice of appeal, may be used on the hearing of the appeal before the county court.

Settlement
of statement.

If the appeal
be upon
questions of
fact, or of
law and fact,
no statement
need be made

Sec. 976. (§ 626) When a party appeals to the county court on questions of fact, or on questions of both law and fact; no statement need be made, but the action must be tried anew in the county court.

Upon the
appeal, the
justice must
transmit the
case to the
county court

Sec. 977. (§ 627.) Upon receiving the notice of appeal and on payment of the fees of the justice or judge, and filing an undertaking as required in the next section, and after settlement or adoption of statement, if any, the justice or judge must, within five days, transmit to the clerk of the county court: if the appeal be on questions of law alone, a certified copy of his docket, the statement as admitted or as settled, the notice of appeal and the under-

taking filed ; or, if the appeal be on questions of fact, or both law and fact, a certified copy of his docket, the pleadings, all notices, motions and other papers filed in the cause, the notice of appeal and the undertaking filed ; and the justice or judge may be compelled by the county court, by an order entered upon motion, to transmit such papers, and may be fined for neglect or refusal to transmit the same. A certified copy of such order may be served on the justice or judge by the party or his attorney. In the county court, either party may have the benefit of all legal objections made in the justice's or police court.

SEC. 978. (§ 628.) An appeal from a justice's or police court is not effectual for any purpose, unless an undertaking be filed, with two or more sureties, in the sum of one hundred dollars, for the payment of the costs on the appeal ; or, if a stay of proceedings be claimed, in a sum equal to twice the amount of the judgment, including costs, when the judgment is for the payment of money ; or twice the value of the property, including costs, when the judgment is for the recovery of specific personal property, and must be conditioned, when the action is for the recovery of money, that the appellant will pay the amount of the judgment appealed from and all costs, if the appeal be withdrawn or dismissed, or the amount of any judgment and all costs that may be recovered against him in the action in the county court. When the action is for the recovery of specific personal property, the undertaking must be conditioned that the appellant will pay the judgment and costs appealed from, and obey the order of the court made therein, if the appeal be withdrawn or dismissed, or any judgment and costs that may be recovered against him in said action in the county court, and will obey any order made by the court therein. A deposit of the amount of the judgment, including all costs appealed from, or of the value of the property, including all costs in actions for the recovery of specific personal property, with the justice or judge, is equivalent to the filing of the undertaking ; and in such cases the justice or judge must transmit the money to the clerk of the county court, to be by him paid out on the order of the court. The adverse party may except to the sufficiency of the sureties

Undertaking
on appeal.

Justification
of sureties.

within five days after the filing of the undertaking, and unless they or other sureties justify before the justice or judge before whom the appeal is taken, within five days thereafter, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal must be regarded as if no such undertaking had been given.

On filing undertaking, execution must be stayed.

SEC. 979. (§ 629.) If an execution be issued, on the filing of the undertaking staying proceedings, the justice or judge must, by order, direct the officer to stay all proceedings on the same. Such officer must, upon payment of his fees for services rendered on the execution, thereupon relinquish all property levied upon and deliver the same to the judgment debtor, together with all moneys collected from sales or otherwise. If his fees be not paid, the officer may retain so much of the property or proceeds thereof as may be necessary to pay the same.

Miscellaneous provisions on trials in county courts.

SEC. 980. (§ 367.) Upon an appeal heard upon a statement of the case, the county court may review all orders affecting the judgment appealed from, and may set aside or confirm, or modify, any or all of the proceedings subsequent to, and dependent upon, such judgment, and may, if necessary or proper, order a new trial. When the action is tried anew, on appeal, the trial must be conducted, in all respects, as trials in the district court. The provisions of this code as to changing the place of trial, and all the provisions as to trials in the district court, are applicable to trials on appeal in the county court. For a failure to prosecute an appeal, or unnecessary delay in bringing it to a hearing, the county court, after notice, may order the appeal to be dismissed. Judgments rendered in the county court on appeal have the same force and effect, and may be enforced in the same manner, as judgments in actions commenced in the district court.

TITLE XIV.

OF THE TRANSFER OF ACTIONS FROM THE STATE TO UNITED STATES COURTS.

SECTION 984. Transfer of suits from state to United States courts.

985. Judgment of the supreme court of this state, when may be reviewed, on error, to the supreme court of the United States.

986. Stay of proceedings until writ of error can be served.

SEC. 984. If a suit is commenced in any court of this state, against an alien, or by a citizen of this state against a citizen of another state, and the matter in dispute exceeds the sum or value of five hundred dollars, exclusive of costs, and the defendant, at the time of entering his appearance in such court of this state, files a petition for the removal of the cause for trial into the next circuit court of the United States, or district court of the United States, having the powers and jurisdiction of a circuit court, to be held in the district where the suit is pending, and offer good and sufficient surety for his entering in such court, on the first day of its session, copies of the pleadings and process against him, the court in which the action is pending must proceed no further in the cause, but transfer it to such United States court.

Transfer of suits from state to U. S. courts.

Statutes of 1855, p. 80.

SEC. 985. A final judgment of the supreme court of this state, in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; in which is drawn in question the validity of a statute of, or an authority exercised under, this state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their validity; in which is drawn in question the construction of any clause of the constitution of the United States, or of a treaty, or of a statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the consti-

Judgment of the supreme court of this state, when may be reviewed, on error, to the supreme court of U. S.

tution, treaty, statute or commission, may be removed by writ of error to, and be re-examined and reversed or affirmed in, the supreme court of the United States, in the manner prescribed by the laws of the United States; and upon the issuing and service of such writ of error, the chief justice or any judge of the court rendering or passing the judgment or decree complained of, upon being applied to by the plaintiff in error, or his attorney, must sign the requisite citation to the adverse party.

Statutes of 1855, p. 80.

Stay of proceedings until writ of error can be served.

SEC. 986. After such judgment has been rendered in the supreme court, if the party against whom the decision has been made, within ten days thereafter, file notice, in writing, with the clerk, of his intention to remove the cause, by writ of error, to the supreme court of the United States, and offers sufficient security, to be approved by the judge of the supreme court, for the prosecution of such writ of error, the supreme court, or any justice thereof at chambers, must stay all proceedings for such time, not exceeding four months, to be fixed by the court or judge, as will be sufficient to enable such party to apply for and serve his writ of error in the mode prescribed by the laws of the United States; and upon the receipt of such writ of error, the clerk of the court in which the record may be, and to which the writ may be directed, must make return thereto, and send up the record or a transcript, without the necessity of any other or further order or authority whatsoever.

Statutes of 1855, p. 80.

TITLE XV.

OF MISCELLANEOUS PROVISIONS.

CHAPTER I. *Proceedings against joint debtors.*

II. *Offer of the defendant to compromise.*

III. *Inspection of writings.*

IV. *Motions and orders.*

V. *Notices, and filing and service of papers.*

VI. *Of costs.*

VII. *General provisions.*

CHAPTER I.

PROCEEDINGS AGAINST JOINT DEBTORS.

SECTION 989. Parties not summoned in action on joint contract may be summoned after judgment.

990. Summons in that case, what to contain and how served.

991. Affidavit to accompany summons.

992. Answer, when filed and what it may contain.

993. What constitute the pleadings in the case.

994. Issues, how tried. Verdict, what to be.

SEC. 989. (§ 368.) When a judgment is recovered against one or more of several persons, jointly indebted upon an obligation, by proceeding, as provided in section four hundred and thirteen, those who were not originally served with the summons, and did not appear to the action, may be summoned to show cause why they should not be bound by the judgment, in the same manner as though they had been originally served with the summons.

Parties not summoned in action on joint contract may be summoned after judgment.

SEC. 990. (§ 369.) The summons, as provided in the last section, must describe the judgment, and require the person summoned to show cause why he should not be bound by it, and must be served in the same manner and returnable within the same time as the original summons. It is not necessary to file a new complaint.

Summons in that case, what to contain and how served.

SEC. 991. (§ 370.) The summons must be accompanied by an affidavit of the plaintiff, his agent, representative or attorney, that the judgment, or some part thereof, remains unsatisfied, and must specify the amount due thereon.

Affidavit to accompany summons.

SEC. 992. (§ 371.) Upon such summons, the defendant may answer within the time specified therein, denying the judgment or setting up any defence which may have arisen subsequently; or he may deny his liability on the obligation upon which the judgment was recovered, except a discharge from such liability by the statute of limitations.

Answer, when filed and what it may contain.

SEC. 993. (§ 372.) If the defendant, in his answer, deny the judgment, or set up any defence which may have arisen subsequently, the summons, with the affidavit

What constitute the pleadings in the case.

annexed, and the answer, constitute the written allegations in the case; if he deny his liability on the obligation upon which the judgment was recovered, a copy of the original complaint and judgment, the summons, with the affidavit annexed, and the answer, constitute such written allegations.

Issues, how
tried.
Verdict,
what to be.

SEC. 994. (§ 373.) The issues formed may be tried as in other cases; but when the defendant denies, in his answer, any liability on the obligation upon which the judgment was rendered, if a verdict be found against him it must be for the amount remaining unsatisfied on such original judgment, with interest thereon.

CHAPTER II.

OFFER OF THE DEFENDANT TO COMPROMISE.

SECTION 997. Proceedings on offer of the defendant to compromise after suit brought.

Proceedings
on offer of
defendant to
compromise
after suit
brought.

SEC. 997. (§ 390.) The defendant may, at any time before the trial or judgment, serve upon the plaintiff an offer to allow judgment to be taken against him for the sum or property, or to the effect therein specified. If the plaintiff accept the offer, and give notice thereof within five days, he may file the summons, complaint and offer, with an affidavit of notice of acceptance, and the clerk must thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence; and if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but must pay the defendant's costs from the time of the offer.

CHAPTER III.

INSPECTION OF WRITINGS.

SECTION 1000. A party may demand inspection and copy of a book, paper, etc.

Sec. 1000. (§ 446.) Any court in which an action is pending, or a judge thereof, or a county judge, may, upon notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of any book, document or paper, in his possession or under his control, containing evidence relating to the merits of the action or the defence therein. If compliance with the order be refused, the court may exclude the book, document or paper from being given in evidence; or if wanted as evidence by the party applying, may direct the jury to presume it to be such as he alleges it to be; and the court may also punish the party refusing, for a contempt. This section is not to be construed to prevent a party from compelling another to produce books, papers or documents when he is examined as a witness.

A party may demand inspection and copy of a book, paper, etc.

CHAPTER IV.

MOTIONS AND ORDERS.

SECTION 1003. Order and motion defined.

1004. Motions and orders, where made.

1005. Notice of motion, at what time to be given.

1006. Transfer of motions and orders to show cause.

1007. Order for payment of money, how enforced.

Sec. 1003. (§ 515.) Every direction of a court or judge made or entered in writing, and not included in a judgment, is denominated an order. An application for an order is a motion.

Order and motion defined.

Sec. 1004. (§ 516.) Motions must be made in the county in which the action is pending, or in an adjoining county in the same judicial district. Orders made out of court may be made by the judge of the court in any part of the state.

Motions and orders, where made.

Sec. 1005. (§ 517.) When a written notice of a motion is necessary, it must be given, if the court be held in the same district with both parties, five days before the time appointed for the hearing; otherwise, ten days; but the court, or judge, or county judge, may prescribe a shorter time.

Notice of motion, at what time to be given.

Transfer of
motions and
orders to
show cause.

SEC. 1006. (§ 518.) When a notice of motion is given, or an order to show cause is made returnable before a judge out of court, and at the time fixed for the motion, or on the return day of the order, the judge is unable to hear the parties, the matter may be transferred by his order to some other judge, before whom it might originally have been brought.

Order for
payment of
money, how
enforced.
N. S.

SEC. 1007. Whenever an order for the payment of a sum of money is made by a court, pursuant to the provisions of this code, it may be enforced by execution in the same manner as if it were a judgment.

CHAPTER V.

NOTICES, AND FILING AND SERVICE OF PAPERS.

SECTION 1010. Notices and papers, how served.

1011. When and how served.

1012. Service by mail, when.

1013. Service by mail, how.

1014. Appearance. Notices after appearance.

1015. Service on non-residents. Where a party has an attorney, service shall be on such attorney.

1016. Preceding provisions not to apply to proceeding to bring party into contempt.

1017. Service by telegraph.

Notices and
papers, how
served.

SEC. 1010. (§ 519.) Notices must be in writing, and notices and other papers may be served upon the party or attorney in the manner prescribed in this chapter, when not otherwise provided by this code.

When and
how served.

SEC. 1011. (§ 520.) The service may be personal, by delivery to the party or attorney on whom the service is required to be made, or it may be as follows :

1. If upon an attorney, it may be made during his absence from his office, by leaving the notice or other papers with his clerk therein, or with a person having charge thereof; or when there is no person in the office, by leaving them, between the hours of eight in the morning and six in the afternoon, in a conspicuous place in the office; or if it be not open so as to admit of such service, then by leaving them at the attorney's residence, with some per-

son of suitable age and discretion; and if his residence be not known, then by putting the same, inclosed in an envelop, into the post-office, directed to such attorney.

2. If upon a party, it may be made by leaving the notice or other paper at his residence, between the hours of eight in the morning and six in the evening, with some person of suitable age and discretion; and if his residence be not known, by putting the same, inclosed in an envelop, into the post-office, directed to such party.

SEC. 1012. (§ 521.) Service by mail may be made, where the person making the service, and the person on whom it is to be made, reside in different places, between which there is a regular communication by mail.

Service by
mail, when.

SEC. 1013. (§ 522.) In case of service by mail, the notice or other paper must be deposited in the post-office, addressed to the person on whom it is to be served, at his place of residence, and the postage paid. And in such case, the time of service must be increased one day for every twenty-five miles distance, between the place of deposit and the place of address; provided, that service in any case is deemed complete at the end of ninety days from the date of its deposit in the post-office.

Service by
mail, how.

SEC. 1014. (§ 523.) A defendant appears in an action when he answers, demurs or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him. After appearance, a defendant or his attorney is entitled to notice of all subsequent proceedings of which notice is required to be given. But where a defendant has not appeared, service of notice or papers need not be made upon him unless he is imprisoned for want of bail.

Appearance.

Notices after
appearance.

SEC. 1015. (§ 524.) When a plaintiff or a defendant, who has appeared, resides out of the state, and has no attorney in the action or proceeding, the service may be made on the clerk for him. But in all cases where a party has an attorney in the action or proceeding, the service of papers, when required, must be upon the attorney instead of the party, except of subpoenas, of writs and other process issued in the suit, and of papers to bring him into contempt.

Service on
non-resi-
dent.

Where a
party has an
attorney,
service shall
be on such
attorney.

Preceding provisions not to apply to proceeding to bring party into contempt.
Service by telegraph.

Sec. 1016. (§ 519.) The foregoing provisions of this chapter do not apply to the service of a summons or other process, or of any paper to bring a party into contempt.

Sec. 1017. Any summons, writ or order, in any civil suit or proceeding, and all other papers requiring service, may be transmitted by telegraph for service in any place, and the telegraphic copy of such writ, or order, or paper, so transmitted, may be served or executed by the officer or person to whom it is sent for that purpose, and returned by him, if any return be requisite, in the same manner, and with the same force and effect, in all respects, as the original thereof might be if delivered to him, and the officer or person serving or executing the same has the same authority, and is subject to the same liabilities, as if the copy were the original. The original, when a writ or order, must also be filed in the court from which it was issued, and a certified copy thereof must be preserved in the telegraph office from which it was sent. In sending it, either the original or the certified copy may be used by the operator for that purpose. Whenever any document to be sent by telegraph bears a seal, either private or official, it is not necessary for the operator, in sending the same, to telegraph a description of the seal, or any words or device thereon, but the same may be expressed in the telegraphic copy by the letters "L. S.," or by the word "seal."

Statutes of 1862, p. 288.

CHAPTER VI.

OF COSTS.

Section 1021. Compensation of attorneys. Costs to parties.

1022. When allowed, of course, to the plaintiff.

1023. Several actions brought on a single cause of action can carry costs in but one.

1024. Defendant's costs must be allowed, of course, in certain cases.

1025. Costs, when in the discretion of the court.

1026. When the several defendants are not united in interest, costs may be severed.

1027. Costs of appeal discretionary with the court, in certain cases.

1028. Referee's fees.

1029. Continuance, costs may be imposed as condition of.

SECTION 1030. Costs when a tender is made before suit brought.

1031. Costs in action by or against an administrator, etc.

1032. Costs in a review other than by appeal.

1033. Costs paid on the commencement of an action.

1034. Filing of, and affidavit, to bill of costs.

1035. Costs on appeal, how claimed and recovered.

1036. Interest and costs must be included by the clerk in the judgment.

1037. When plaintiff is a non-resident or foreign corporation, defendant may require security for costs.

1038. If such security be not given, the action may be dismissed.

1039. Costs when state is a party.

1040. Costs when county is a party.

SEC. 1021. (§ 494.) The measure and mode of compensation of attorneys and counsellors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to costs and disbursements, as hereinafter provided.

Compensation of attorneys.

Costs to parties.

SEC. 1022. (§ 495.) Costs are allowed, of course, to the plaintiff, upon a judgment in his favor, in the following cases :

When allowed, of course, to the plaintiff.

1. In an action for the recovery of real property.

2. In an action to recover the possession of personal property, where the value of the property amounts to three hundred dollars or over; such value shall be determined by the jury, court or referee by whom the action is tried.

3. In an action for the recovery of money or damages, when plaintiff recovers three hundred dollars or over.

4. In a special proceeding.

5. In an action which involves the title or possession of real estate, or the legality of any tax, impost, assessment, toll or municipal fine.

SEC. 1023. (§ 496.) When several actions are brought on one bond, undertaking, promissory note, bill of exchange or other instrument in writing, or in any other case for the same cause of action, against several parties who might have been joined as defendants in the same action, no costs can be allowed to the plaintiff in more than one of such actions, which may be at his election, if the party proceeded against in the other actions were, at the commencement of the previous action, openly within

Several actions brought on a single cause of action can carry costs in but one.

this state ; but the disbursements of the plaintiff must be allowed to him in each action.

Defendant's costs must be allowed, of course, in certain cases.

SEC. 1024. (§ 497.) Costs must be allowed, of course, to the defendant, upon a judgment in his favor in the actions mentioned in section ten hundred and twenty-two, and in special proceedings.

Costs, when in the discretion of the court.

SEC. 1025. (§ 498.) In other actions than those mentioned in section ten hundred and twenty-two, costs may be allowed or not, and, if allowed, may be apportioned between the parties, on the same or adverse sides, in the discretion of the court; but no costs can be allowed in an action for the recovery of money or damages when the plaintiff recovers less than three hundred dollars, nor in an action to recover the possession of personal property, when the value of the property is less than three hundred dollars.

When the several defendants are united in interest, costs may be severed.

SEC. 1026. (§ 499.) When there are several defendants in the actions mentioned in section ten hundred and twenty-two, not united in interest, and making separate defences by separate answers, and plaintiff fails to recover judgment against all, the court must award costs to such of the defendants as have judgment in their favor.

Costs of appeal discretionary with the court, in certain cases.

SEC. 1027. (§ 500.) In the following cases, the costs of appeal is in the discretion of the court:

1. When a new trial is ordered.
2. When a judgment is modified.

Referee's fees.

SEC. 1028. (§ 504) The fees of referees are five dollars to each for every day spent in the business of the reference; but the parties may agree, in writing, upon any other rate of compensation, and thereupon such rate shall be allowed.

Continuance, costs may be imposed as condition of.

SEC. 1029. (§ 505.) When an application is made to a court or referee to postpone a trial, the payment of costs occasioned by the postponement may be imposed, in the discretion of the court or referee, as a condition of granting the same.

Costs when a tender is made before suit brought.

SEC. 1030. (§ 506.) When, in an action for the recovery of money only, the defendant alleges in his answer

that before the commencement of the action he tendered to the plaintiff the full amount to which he was entitled, and thereupon deposits in court for the plaintiff the amount so tendered, and the allegation be found to be true, the plaintiff cannot recover costs, but must pay costs to the defendant.

Sec. 1031. (§ 507.) In an action prosecuted or defended by an executor, administrator, trustee of express trust, or a person expressly authorized by statute, costs may be recovered as in action by and against a person prosecuting or defending in his own right; but such costs must, by the judgment, be made chargeable only upon the estate, fund or party represented, unless the court directs the same to be paid by the plaintiff or defendant, personally, for mismanagement or bad faith in the action or defence.

Costs in action by or against an administrator, etc.

Sec. 1032. (§ 508.) When the decision of a court of inferior jurisdiction in a special proceeding is brought before a court of higher jurisdiction for a review, in any other way than by appeal, the same costs must be allowed as in cases on appeal, and may be collected by execution, or in such manner as the court may direct, according to the nature of the case.

Costs in a review other than by appeal.

Sec. 1033. (§ 509.) On the commencement of an action the plaintiff, and, on the filing of notice of appeal from final judgment, the appellant, must pay to the clerk three dollars, to be applied to the payment of the salary of the judge of the court in which the payment is made. Each clerk must keep an account of all moneys so received, and pay over the same at the end of each month to the judge of such court, taking duplicate receipts for each payment, one of which must be filed by the said clerk in his office. On the first day of each month the said clerk must deliver to the auditor of the county an account of all sums received, specifying the cases in which received, and of all sums paid out. At the same time a like account must be made out and forwarded by such clerk to the controller of state, of the sums paid into the district court and of the sums paid out, with the other receipts of said judge therefor. The district attorney, at

Costs paid on the commencement of an action.

the commencement of each month, must examine the books of the clerk, and if found correct in the amount paid to the district judge, he must make a certificate to the controller to that effect; and if the books are found correct in the amount paid to the county judge, the district attorney must in like manner make and execute a certificate to the county auditor to that effect. In paying the salary of any district judge, the controller must deduct the amount paid to such judge, as shown by his receipt; and in like manner the county auditor, in paying the salary of any county judge, must deduct the amount to such judge, as shown by his receipt.

Filing of, and
affidavit, to
bill of costs.

SEC. 1034. (§ 510.) The party in whose favor judgment is rendered, and who claims his costs, must deliver to the clerk of the court, within two days after the verdict or decision of the court, a memorandum of the items of his costs and necessary disbursements in the action or proceeding, which memorandum must be verified by the oath of the party or his attorney, stating that the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding.

Costs on
appeal, how
claimed and
recovered.

SEC. 1035. (§ 665.) Whenever costs are awarded to a party by an appellate court, if he claims such costs, he must, within two days after the remittitur is filed with the clerk below, deliver to such clerk a memorandum of his costs, verified as prescribed by the preceding section, and thereafter he may have an execution therefor as upon a judgment.

Interest and
costs must
be included
by the clerk
in the judg-
ment.

SEC. 1036. (§ 511.) The clerk must include in the judgment entered up by him, any interest on the verdict or decision of the court, from the time it was rendered or made, and the costs, if the same have been taxed or ascertained; and he must, within two days after the same are taxed or ascertained, if not included in the judgment, insert the same in a blank, left in the judgment for that purpose, and must make a similar insertion of the costs in the copies and docket of the judgment.

When plain-
tiff is a non-
resident or
foreign cor-
poration,
defendant
may require
security for
costs.

SEC. 1037. (§ 512.) When the plaintiff in an action resides out of the state, or is a foreign corporation, security for the costs and charges, which may be awarded against

such plaintiff, may be required by the defendant. When required, all proceedings in the action must be stayed until an undertaking, executed by two or more persons, is filed with the clerk, to the effect that they will pay such costs and charges as may be awarded against the plaintiff by judgment, or in the progress of the action, not exceeding the sum of three hundred dollars. A new or an additional undertaking may be ordered by the court or judge, upon proof that the original undertaking is insufficient security, and proceedings in the action stayed until such new or additional undertaking is executed and filed.

Sec. 1038. (§ 514.) After the lapse of thirty days from the service of notice that security is required, or of an order for new or additional security, upon proof thereof, and that no undertaking as required has been filed, the court or judge may order the action to be dismissed.

If such security be not given, the action may be dismissed.

Sec. 1039. When the state is a party, and costs are awarded against it, they must be paid out of the state treasury.

Costs when state is a party.

Sec. 1040. When a county is a party, and costs are awarded against it, they must be paid out of the county treasury.

Costs when county is a party.

CHAPTER VII.

GENERAL PROVISIONS.

Section 1045. Lost papers, how supplied.

1046. Papers without the title of the action, or with defective title, may be valid.

1047. Successive actions on the same contract, etc.

1048. Consolidation of several actions into one.

1049. Actions, when deemed pending.

1050. Actions to determine adverse claims and by sureties.

1051. Testimony, when to be taken by the clerk.

1052. The clerk must keep a register of actions.

1053. Two of three referees, etc., may do any act.

1054. The time within which an act is to be done may be extended.

1055. Actions against a sheriff for official acts.

1056. Actions may be prosecuted in the Spanish language in certain counties.

1057. Undertakings mentioned in this code, requisites of.

1058. People of state not required to give bonds when state is a party.

Lost papers,
how supplied

SEC. 1045. If an original pleading or paper be lost, the court may authorize a copy thereof to be filed and used instead of the original.

Papers with-
out the title
of the action,
or with de-
fective title,
may be valid.

SEC. 1046. (§ 531.) An affidavit, notice or other paper, without the title of the action or proceeding in which it is made, or with a defective title, is as valid and effectual for any purpose as if duly entitled, if it intelligibly refer to such action or proceeding.

Successive
actions on
the same
contract, etc.

SEC. 1047. (§ 525.) Successive actions may be maintained upon the same contract or transaction, whenever, after the former action, a new cause of action arises therefrom.

Consolida-
tion of sev-
eral actions
into one.

SEC. 1048. (§ 526.) Whenever two or more actions are pending at one time between the same parties and in the same court, upon causes of action which might have been joined, the court may order the actions to be consolidated.

Actions,
when deem'd
pending.
N. E.

SEC. 1049. An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied.

Actions to
determine
adverse
claims and
by sureties.

SEC. 1050. (§ 527.) An action may be brought by one person against another for the purpose of determining an adverse claim, which the latter makes against the former for money or property upon an alleged obligation; and also against two or more persons, for the purpose of compelling one to satisfy a debt due to the other, for which plaintiff is bound as a surety.

Testimony,
when to be
taken by the
clerk.

SEC. 1051. (§ 633.) On the trial of an action in a court of record, if there is no short hand reporter of the court in attendance, either party may require the clerk to take down the testimony in writing.

The clerk
must keep a
register of
actions.

SEC. 1052. (§ 528.) The clerk must keep among the records of the court a register of actions. He must enter therein the title of the action, with brief notes under it, from time to time, of all papers filed and proceedings had therein.

SEC. 1053. (§ 529.) When there are three referees, or three arbitrators, all must meet, but two of them may do any act which might be done by all.

Two of three referees, etc., may do any act.

SEC. 1054. (§ 530.) When the act to be done relates to the pleadings in the action, or the undertakings to be filed, or the justification of sureties, or the service of notices, other than of appeal, the time allowed by this code may, before the time expires, be extended, upon good cause shown, by the court in which the action is pending, or the judge thereof, but such extension cannot exceed fifteen days.

The time within which an act is to be done may be extended.

SEC. 1055. (§ 645.) If an action is brought against a sheriff for an act done by virtue of his office, and he give written notice thereof to the sureties on any bond of indemnity received by him, the judgment recovered therein is conclusive evidence of his right to recover against such sureties; and the court, or judge in vacation, may, on motion, upon notice of five days, order judgment to be entered up against them for the amount so recovered, including costs.

Actions against a sheriff for official acts.

SEC. 1056. (§ 646.) In the counties of Monterey, San Luis Obispo, Santa Barbara, Los Angeles and San Diego, if the defendant requires it, a copy of the summons or other process in the Spanish language must be delivered to him; and in the counties of Santa Barbara, San Luis Obispo, Los Angeles, San Diego and Monterey, with the consent of both parties, the process, pleadings and other proceedings in a cause, may be in the Spanish language.

Actions may be prosecuted in the Spanish language in certain counties.

SEC. 1057. (§ 650.) In all cases where an undertaking with sureties is required by the provisions of this code, the officer taking the same must require the sureties to accompany it with an affidavit that they are each residents and householders or freeholders within the state, and are each worth the sum specified in the undertaking, over and above all their just debts and liabilities, exclusive of property exempt from execution; but when the amount specified in the undertaking exceeds three thousand dollars, and there are more than two sureties thereon, they may state in their affidavits that they are severally worth amounts less than that expressed in the undertak-

Undertakings mentioned in this code, requisites of.

ing, if the whole amount be equivalent to that of two sufficient sureties.

People of
state not
required to
give bonds
when state
is a party.

Sec. 1058. In any civil action or proceeding wherein the state or the people of the state is a party plaintiff, or any state officer, in his official capacity or on behalf of the state, or any county, city or town, is a party plaintiff or defendant, no bond, written undertaking or security can be required of the state or the people thereof, or any officer thereof, or of any county, city or town; but on complying with the other provisions of this code, the state or the people thereof, or any state officer acting in his official capacity, have the same rights, remedies and benefits as if the bond, undertaking or security were given and approved as required by this code.

Statutes of 1864, p. 261; 1856, p. 26.

PART III.

OF SPECIAL PROCEEDINGS

OF A CIVIL NATURE.

PART III.
OF SPECIAL PROCEEDINGS OF A CIVIL
NATURE.

PRELIMINARY PROVISIONS.

SECTION 1063. Parties, how designated.

1064. Judgment and order same meaning as in civil actions.

SEC. 1063. The party prosecuting a special proceeding may be known as the plaintiff, and the adverse party, as the defendant.

Parties, how
designated.

SEC. 1064. A judgment in a special proceeding is the final determination of the rights of the parties therein. The definitions of a motion and an order in a civil action are applicable to similar acts in a special proceeding.

Judgment
and order
same mean-
ing as in civil
actions.

TITLE I.

OF WRITS OF REVIEW, MANDATE AND PROHIBITION.

CHAPTER I. *Writ of review.*

II. *Writ of mandate.*

III. *Writ of prohibition.*

IV. *Writs of review, mandate and prohibition may
issue and be heard at chambers.*

CHAPTER I.

WRIT OF REVIEW.

SECTION 1067. Writ of review defined.

1068. When and by what courts granted.

1069. Application for, how made.

SECTION 1070. The writ to be directed to the inferior tribunal, etc.

1071. Contents of the writ.

1072. Proceedings in inferior court may be stayed, or not.

1073. Service of the writ.

1074. The review under the writ, extent of.

1075. A defective return of the writ may be perfected. Hearing and judgment.

1076. Copy of judgment must be sent to the inferior tribunal.

1077. Judgment rolls.

1078. Appeals.

Writ of review defined.

SEC. 1067. (§ 455.) The writ of certiorari must hereafter be known as the writ of review.

When and by what courts granted.

SEC. 1068. (§ 456.) A writ of review may be granted by any court, except a police or justice's court, when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy.

Application for, how made.

SEC. 1069. (§ 457.) The application must be made on affidavit by the party beneficially interested, and the court may require a notice of the application to be given to the adverse party, or may grant an order to show cause why it should not be allowed, or may grant the writ without notice.

The writ to be directed to the inferior tribunal, etc.

SEC. 1070 (§ 458.) The writ may be directed to the inferior tribunal, board or officer, or to any other person having the custody of the record or proceedings to be certified. When directed to a tribunal, the clerk, if there be one, must return the writ with the transcript required.

Contents of the writ.

SEC. 1071. (§ 459) The writ of review must command the party to whom it is directed to certify fully to the court issuing the writ, at a specified time and place, a transcript of the record and proceedings (describing or referring to them with convenient certainty), that the same may be reviewed by the court; and requiring the party, in the meantime, to desist from further proceedings in the matter to be reviewed.

Proceedings in inferior court may be stayed, or not.

SEC. 1072. (§ 460.) If a stay of proceedings be not intended, the words requiring the stay must be omitted

from the writ; these words may be inserted or omitted, in the sound discretion of the court; but if omitted, the power of the inferior court or officer is not suspended or the proceedings stayed.

Sec. 1073. (§ 461.) The writ must be served in the same manner as a summons in civil action, except when otherwise expressly directed by the court.

Service of
the writ.

Sec. 1074. (§ 462.) The review upon this writ cannot be extended further than to determine whether the inferior tribunal, board or officer has regularly pursued the authority of such tribunal, board or officer.

The review
under the
writ, extent
of.

Sec. 1075. (§ 463.) If the return of the writ be defective, the court may order a further return to be made. When a full return has been made, the court must hear the parties, or such of them as may attend for that purpose, and may thereupon give judgment, either affirming or annulling, or modifying the proceedings below.

A defective
return of the
writ may be
perfected
Hearing and
judgment.

Sec. 1076. (§ 464.) A copy of the judgment, signed by the clerk, must be transmitted to the inferior tribunal, board or officer having the custody of the record or proceeding certified up.

Copy of judgment must
be sent to
the inferior
tribunal.

Sec. 1077. (§ 465.) A copy of the judgment, signed by the clerk, entered upon or attached to the writ and return, constitute the judgment roll.

Judgment
rolls.

Sec. 1078. (§ 465.) If the proceeding is in any other than the supreme court, an appeal may be taken from the judgment, in the same manner and upon the same terms as from a judgment in a civil action.

Appeals.

CHAPTER II.

WRIT OF MANDATE.

SECTION 1083. Mandate defined.

1084. When and by what court issued.

1085. Writ, when and upon what to issue.

1086. Must be either alternative or peremptory. Substance.

Section 1087. If the application be without notice, the alternative writ may issue ; otherwise, the peremptory. Notice and default.

1088. The adverse party may answer under oath.

1089. If an essential question of fact is raised, the court may order a jury trial.

1090. The applicant may demur to the answer or countervail it by proof.

1091. Certain provisions of part two applicable.

1092. Motion for new trial, where made.

1093. The clerk must transmit the verdict to the court where the motion is pending, after which the hearing shall be had on motion.

1094. If no answer be made, or if the answer raise no material issue of fact, the hearing must be before the court.

1095. If the applicant succeed, he may have damages, costs and a peremptory mandate.

1096. Service of the writ.

1097. Penalty for disobedience to the writ.

Mandate defined.

Sec. 1083. (§ 466.) The writ of mandamus must hereafter be designated the writ of mandate.

When and by what court issued.

Sec. 1084. (§ 467.) It may be issued by any court, except a justice's or police court, to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust or station ; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person.

Writ, when and upon what to issue

Sec. 1085. (§ 468.) The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It must be issued upon affidavit, on the application of the party beneficially interested.

Must be either alternative or peremptory. Substance.

Sec. 1086. (§ 469.) The writ may be either alternative or peremptory. The alternative writ must state generally the allegation against the party to whom it is directed, and command such party, immediately after the receipt of the writ, or at some other specified time, to do the act required to be performed, or to show cause before the court, at a specified time and place, why he has not done so. The peremptory writ must be in a similar form, except that the words requiring the party to show cause

why he has not done as commanded must be omitted, and a return day inserted.

SEC. 1087. (§ 470.) When the application to the court is made without notice to the adverse party, and the writ be allowed, the alternative must be first issued; but if the application be upon due notice, and the writ be allowed, the peremptory may be issued in the first instance. The notice of the application, when given, must be at least ten days. The writ cannot be granted by default. The case must be heard by the court, whether the adverse party appear or not.

If the application be without notice, the alternative writ may issue; otherwise, the peremptory. Notice and default.

SEC. 1088. (§ 471.) On the return of the alternative, or the day on which the application for the writ is noticed, the party on whom the writ or notice has been served may show cause by answer under oath, made in the same manner as an answer to a complaint in a civil action.

The adverse party may answer under oath.

SEC. 1089. (§ 472.) If an answer be made, which raises a question as to a matter of fact essential to the determination of the motion, and affecting the substantial rights of the parties, and upon the supposed truth of the allegation of which the application for the writ is based, the court may, in its discretion, order the question to be tried before a jury, and postpone the argument until such trial can be had, and the verdict certified to the court. The question to be tried must be distinctly stated in the order for trial, and the county must be designated in which the same shall be had. The order may also direct the jury to assess any damages which the applicant may have sustained, in case they find for him.

If an essential question of fact is raised, the court may order a jury trial.

SEC. 1090. (§ 473.) On the trial, the applicant is not precluded by the answer of any valid objection to its sufficiency, and may countervail it by proof either in direct denial or by way of avoidance.

Applicant may demur to the answer or countervail it by proof.

SEC. 1091. (§ 474.) The provisions of part two of this code, relative to exceptions, bills of exception, new trials and appeals, apply to this proceeding, but after a second verdict in favor of the same party, a new trial cannot be granted. ✓

Certain provisions of part II applicable.

Motion for
new trial,
where made.

SEC. 1092. The motion for new trial must be made in the court in which the issue of fact is tried.

Clerk must
transmit the
verdict to the
court where
the motion is
pending,
after which
the hearing
shall be had
on motion.

SEC. 1093. (§ 475.) If no notice of a motion for a new trial be given, or, if given, the motion be denied, the clerk, within five days after rendition of the verdict or denial of the motion, must transmit to the court in which the application for the writ is pending, a certified copy of the verdict attached to the order of trial; after which either party may bring on the argument of the application, upon reasonable notice to the adverse party.

If no answer
be made, or if
the answer
raise no ma-
terial issue
of fact, the
hearing must
be before the
court.

SEC. 1094. (§ 476.) If no answer be made, the case must be heard on the papers of the applicant. If an answer be made which does not raise a question such as is mentioned in section ten hundred and eighty-nine, but only such matters as may be explained or avoided by a reply, the court may, in its discretion, grant time for replying. If the answer, or answer and reply, raise only questions of law, or put in issue immaterial statements, not affecting the substantial rights of the parties, the court must proceed to hear, or fix a day for hearing, the argument of the case.

If the appli-
cant succeed,
he may have
damages,
costs, and a
peremptory
mandate.

SEC. 1095. (§ 477.) If judgment be given for the applicant, he may recover the damages which he has sustained, as found by the jury, or as may be determined by the court or referees, upon a reference to be ordered, together with costs; and for such damages and costs an execution may issue; and a peremptory mandate must also be awarded without delay.

Service of
the writ.

SEC. 1096. (§ 478.) The writ must be served in the same manner as a summons in a civil action, except when otherwise expressly directed by order of the court. Service upon a majority of the members of any board or body, is service upon the board or body, whether at the time of the service the board or body was in session or not.

Penalty for
disobedience
to the writ.

SEC. 1097. (§ 479.) When a peremptory mandate has been issued and directed to any inferior tribunal, corporation, board or person, if it appear to the court that any member of such tribunal, corporation or board, or such

person upon whom the writ has been personally served, has, without just excuse, refused or neglected to obey the same, the court may, upon motion, impose a fine not exceeding one thousand dollars. In case of persistence in a refusal of obedience, the court may order the party to be imprisoned for a period not exceeding three months, and may make any orders necessary and proper for the complete enforcement of the writ. If a fine be imposed upon a judge or officer who draws a salary from the state or county, a certified copy of the order must be forwarded to the controller or county treasurer, as the case may be, and the amount thereof may be retained from the salary of such judge or officer.

CHAPTER III.

WRIT OF PROHIBITION.

SECTION 1102. Prohibition defined.

1103. Where and when issued.

1104. Writ may be alternative or peremptory. Form of.

1105. Certain provisions of the preceding chapter applicable.

SEC. 1102. The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person.

Prohibition
defined.

SEC. 1103. It may be issued by any court except police or justices' courts, to an inferior tribunal or to a corporation, board or person, in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It is issued upon affidavit, on the application of the person beneficially interested.

Where and
when issued.

SEC. 1104. The writ must be either alternative or peremptory. The alternative writ must state generally the allegation against the party to whom it is directed, and command such party to desist or refrain from further proceedings in the action or matter specified therein, until

Writ may be
alternative
or peremp-
tory
Form of.

the further order of the court from which it is issued, and to show cause before such court, at a specified time and place, why such party should not be absolutely restrained from any further proceedings in such action or matter. The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he should not be absolutely restrained, etc., must be omitted and a return day inserted.

Certain provisions of the preceding chapter applicable.

SEC. 1105. The provisions of the preceding chapter, except of the four first sections thereof, apply to this proceeding.

CHAPTER IV.

WRITS OF REVIEW, MANDATE AND PROHIBITION MAY ISSUE AND BE HEARD AT CHAMBERS.

SECTION 1108. Writs of review, mandate and prohibition may issue and be heard at chambers.

Writs of review, mandate and prohibition may issue and be heard at chambers.

SEC. 1108. (§ 653.) Writs of review, mandate and prohibition may be issued by any three of the justices of the supreme court, or by any district or county judge, in vacation, and may, in the discretion of the justices or judge issuing the writ, be made returnable and a hearing thereon be had in vacation.

TITLE II.

OF CONTESTING CERTAIN ELECTIONS.

SECTION 1111. Who may contest, and grounds of contest.

1112. Irregularity and improper conduct of judges, when to annul elections.

1113. When not to.

1114. Illegal votes, when not to vitiate election.

1115. Proceedings on contest.

1116. Statement of cause of contest. When based on reception of illegal votes, contestant to deliver to respondent a list of votes claimed to be illegal.

1117. Statement of cause of contest; want of form not to vitiate

1118. County judge to hold special term for trial of contest.

1119. Clerk to issue citation to respondent.

SECTION 1120. Witnesses—attendance of, how enforced.

1121. Power of court. Adjournment of court.

1122. Rules to govern court in trial of contest.

1123. Court may declare who was elected.

1124. Fees of officers and witnesses.

1125. Costs.

1126. Appeal.

1127. When election void and office vacant.

SEC. 1111. Any elector of the county may contest the right of any person declared elected to an office to be exercised in and for such county; and, also, any elector of a township may contest the right of any person declared elected to any office in and for such township, for any of the following causes:

Who may contest, and grounds of contest.

1. For malconduct on the part of the board of judges, or any member thereof.

2. When the person whose right to the office is contested was not, at the time of the election, eligible to such office.

3. When the person whose right is contested has given to any elector or inspector, judge or clerk of the election, any bribe or reward, or has offered any such bribe or reward for the purpose of procuring his election.

4. On account of illegal votes.

Statutes of 1850, p. 101.

SEC. 1112. No irregularity or improper conduct in the proceedings of the judges, or any of them, is such malconduct as avoids an election, unless the irregularity or improper conduct is such as to procure the person whose right to the office is contested to be declared elected when he had not received the highest number of legal votes.

Irregularity and improper conduct of judges, when to annul elections.

SEC. 1113. When any election held for an office exercised in and for a county is contested on account of any malconduct on the part of the board of judges of any township election, or any member thereof, the election cannot be annulled and set aside upon any proof thereof, unless the rejection of the vote of such township or townships would change the result as to such office in the remaining vote of the county.

When not to.

SEC. 1114. Nothing in the fourth ground of contest, specified in section eleven hundred and eleven, is to be so

Illegal votes, when not to vitiate elections

construed as to authorize an election to be set aside on account of illegal votes, unless it appear that a number of illegal votes has been given to the person whose right to the office is contested, which, if taken from him, would reduce the number of his legal votes below the number of votes given to some other person for the same office, after deducting therefrom the illegal votes which may be shown to have been given to such other person.

Proceedings
on contest.

SEC 1115. When an elector contests the right of any person declared elected to such office, he must, within forty days after the return day of the election, file with the county clerk a written statement, setting forth specifically :

1. The name of the party contesting such election, and that he is an elector of the district, county or township, as the case may be, in which such election was held.

2. The name of the person whose right to the office is contested.

3. The office.

4. The particular grounds of such contest.

Which statement must be verified by the affidavit of the contesting party, that the matters and things therein contained are true.

Statement
of cause of
contest.
When based
on reception
of illegal
votes, con-
testant to
deliver to
respondent a
list of votes
claimed to
be illegal.

SEC. 1116. When the reception of illegal votes is alleged as a cause of contest, it is sufficient to state generally, that illegal votes were given to the person whose election is contested in the specified township or townships, which, if taken from him, will reduce the number of his legal votes below the number of legal votes given to some other person for the same office; but no testimony can be received of any illegal votes, unless the party contesting such election deliver to the opposite party, at least three days before such trial, a written list of the number of illegal votes, and by whom given, which he intends to prove on such trial; and no testimony can be received of any illegal votes except such as are specified in such list.

Statement
of cause of
contest, want
of form not
to vitiate.

SEC. 1117. No statement of the grounds of contest will be rejected, nor the proceedings dismissed by any court for want of form, if the particular grounds of contest are alleged with such certainty as will advise the defendant

of the particular proceeding or cause for which such election is contested.

Sec. 1118. Upon the statement being filed, the county clerk must inform the judge of the county court, who must give notice and order a special term of court to be held at the court-house of the proper county, on some day to be named by him, not less than ten nor more than twenty days from the date of such notice, to hear and determine such contested election.

County judge
to hold spe-
cial term for
trial of con-
test

Sec. 1119. The clerk must also, at the same time, issue a citation for the person whose right to the office is contested, to appear at the time and place specified in the notice, which citation must be delivered to the sheriff and be served upon the party in person, or, if he cannot be found, by leaving a copy thereof at the house where he last resided.

Clerk to issue
citation to
respondent.

Sec. 1120. The clerk must issue subpoenas for witnesses at the request of either party, which must be served by the sheriff as other subpoenas; and the county court has full power to issue attachments to compel the attendance of witnesses who have been subpoenaed to attend.

Witnesses—
attendance
of, how en-
forced.

Sec. 1121. The court must meet at the time and place designated, to determine such contested election, and shall have all the powers necessary to the determination thereof. It may adjourn from day to day until such trial is ended, and may also continue the trial, before its commencement, to any time not exceeding twenty days, for good cause shown by either party upon affidavit, at the costs of the party applying for such continuance.

Power of
court.

Adjourn-
ment of court

Sec. 1122. The court must be governed, in the trial and determination of such contested election, by the rules of law and evidence governing the determination of questions of law and fact, so far as the same may be applicable; and may dismiss the proceedings if the statement of the cause or causes of the contest is insufficient, or for want of prosecution. After hearing the proofs and allegations of the parties, the court must pronounce judgment in the premises, either confirming or annulling and setting aside such election.

Rules to gov-
ern court
in trial of
contest.

Court may
declare who
was elected.

SEC. 1123. If in any such case it appears that another person than the one returned has the highest number of legal votes, the court must declare such person elected.

Fees of offi-
cers and wit-
nesses.

SEC. 1124. The clerk, sheriff and witnesses shall receive, respectively, the same fees, from the party against whom judgment is given, as are allowed for similar services in the district court.

Costs.

SEC. 1125. If the proceedings are dismissed for insufficiency, want of prosecution, or the election is by the court confirmed, judgment must be rendered against the party contesting such election, for costs, in favor of the party whose election was contested; but if the election is annulled and set aside, judgment for costs must be rendered against the party whose election was contested, in favor of the party contesting the same. Primarily, each party is liable for the costs created by himself, to the officers and witnesses entitled thereto, which may be collected in the same manner as similar costs are collected in the district court.

Appeal.

SEC. 1126. Either party, aggrieved by the judgment of the court, may appeal therefrom to the supreme court, as in other cases of appeal thereto from the county court.

When elec-
tion void and
office vacant.

SEC. 1127. Whenever an election is annulled or set aside by the judgment of the county court, and ten days has elapsed and no appeal been taken, the commission, if any has issued, is void and the office vacant.

TITLE III.

OF SUMMARY PROCEEDINGS.

CHAPTER I. *Confession of judgment without action.*

II. *Submitting a controversy without action.*

III. *Discharge of persons imprisoned on civil process.*

IV. *Summary proceedings for obtaining possession of real property in certain cases.*

CHAPTER I.

CONFESSION OF JUDGMENT WITHOUT ACTION.

SECTION 1132. Judgment may be confessed for debt due or contingent liability.

1133. Statement in writing and form thereof.

1134. Filing statement and entering judgment.

1135. How, in justices' courts.

SEC. 1132. (§ 374.) A judgment by confession may be entered without action, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter.

Judgment may be confessed for debt due or contingent liability.

SEC. 1133. (§ 375.) A statement in writing must be made, signed by the defendant and verified by his oath, to the following effect:

Statement in writing and form thereof.

1. It must authorize the entry of judgment for a specified sum.

2. If it be for money due, or to become due, it must state concisely the facts out of which it arose, and show that the sum confessed therefor is justly due, or to become due.

3. If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and show that the sum confessed therefor does not exceed the same.

SEC. 1134. (§ 376.) The statement must be filed with the clerk of the county in which the judgment is to be entered, who must indorse upon it, and enter in the judgment book, a judgment of such court for the amount confessed, with ten dollars costs. The statement and affidavit, with the judgment indorsed, thereupon becomes the judgment roll.

Filing statement and entering judgment.

SEC. 1135. In a justice's court, where the court has authority to enter the judgment, the statement may be filed with the justice, who must thereupon enter in his docket a judgment of his court for the amount confessed, with three dollars costs. If a transcript of such judgment be filed with the county clerk, a copy of the statement must be filed with it.

How, in justices' courts.

CHAPTER II.

SUBMITTING A CONTROVERSY WITHOUT ACTION.

SECTION 1138. Controversy, how submitted without action.

1139. Judgment on, as in other cases, but without costs prior to notice of trial.

1140. Judgment may be enforced or appealed from as in an action.

Controversy,
how submit-
ted without
action.

SEC. 1138. (§ 377.) Parties to a question in difference, which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought; but it must appear, by affidavit, that the controversy is real and the proceedings in good faith, to determine the rights of the parties. The court must thereupon hear and determine the case, and render judgment thereon, as if an action were depending.

Judgment
on, as in
other cases,
but without
costs prior to
notice of trial

SEC. 1139. (§ 378.) Judgment must be entered in the judgment book as in other cases, but without costs for any proceeding prior to the trial. The case, the submission and a copy of the judgment constitute the judgment roll.

Judgment
may be en-
forced or
appealed
from as in
an action.

SEC. 1140. (§ 379.) The judgment may be enforced in the same manner as if it had been rendered in an action, and is in the same manner subject to appeal.

CHAPTER III.

DISCHARGE OF PERSONS IMPRISONED ON CIVIL PROCESS.

SECTION 1143. Persons confined may be discharged.

1144. Notice of application.

1145. Service of notice.

1146. Examination before judge.

1147. Interrogatories may be in writing.

1148. Oath to be administered.

1149. Order of discharge.

1150. If not discharged, prisoner may again apply, when.

1151. Discharge final.

1152. Judgment remains in force.

SECTION 1153. Plaintiff may order discharge of prisoner, who shall not thereafter be liable to imprisonment for the same cause of action.

1154. Plaintiff to advance funds for support of prisoner.

SEC. 1143. Any person confined in jail on an execution issued on a judgment rendered in a civil action, must be discharged therefrom upon the conditions in this chapter specified.

Persons confined may be discharged.

SEC. 1144. Such person must cause a notice in writing to be given to the plaintiff, his agent or attorney, that at a certain time and place he will apply to the judge of the district court of the county in which such person may be confined; or, in case of his absence or inability to act, to the judge of the county court of the county in which such person may be imprisoned, for the purpose of obtaining a discharge from his imprisonment.

Notice of application.

SEC. 1145. Such notice must be served upon the plaintiff, his agent or attorney, one day at least before the hearing of the application, in cases where the plaintiff, his agent or attorney, lives within twenty miles of the place of hearing; and one day must be added for every additional twenty miles that such person may reside from the place of hearing.

Service of notice.

SEC. 1146. At the time and place specified in the notice, such person must be taken before such judge, who must examine him under oath concerning his estate and property and effects, and the disposal thereof, and his ability to pay the judgment for which he is committed; and such judge may also hear any other legal and pertinent evidence that may be produced by the debtor or the creditor.

Examination before judge.

SEC. 1147. The plaintiff in the action may, upon such examination, propose to the prisoner any interrogatories pertinent to the inquiry, and they must, if required by him, be proposed and answered in writing, and the answer must be signed and sworn to by the prisoner.

Interrogatories may be in writing.

SEC. 1148. If, upon the examination, the judge is satisfied that the prisoner is entitled to his discharge, he

Oath to be administered

must administer to him the following oath, to wit: "I, ———, do solemnly swear that I have not any estate, real or personal, to the amount of fifty dollars, except such as is by law exempted from being taken in execution; and that I have not any other estate now conveyed or concealed, or in any way disposed of, with design to secure the same to my use, or to defraud my creditors, so help me God."

Order of
discharge

SEC. 1149. After administering the oath, the judge must issue an order that the prisoner be discharged from custody, and the officer, upon the service of such order, must discharge the prisoner forthwith, if he be imprisoned for no other cause.

If not dis-
charged,
prisoner may
again apply,
when

SEC. 1150. If such judge does not discharge the prisoner, he may apply for his discharge at the end of every succeeding ten days, in the same manner as above provided, and the same proceedings must thereupon be had.

Discharge
final.

SEC. 1151. The prisoner, after being so discharged, is forever exempted from arrest or imprisonment for the same debt, unless he be convicted of having wilfully sworn falsely upon his examination before the judge, or in taking the oath before prescribed.

Judgment
remains in
force.

SEC. 1152. The judgment against any prisoner who is discharged remains in full force against any estate which may then or at any time afterward belong to him, and the plaintiff may take out a new execution against the goods and estate of the prisoner, in like manner as if he had never been committed.

Plaintiff may
order dis-
charge of
prisoner,
who shall not
thereafter be
liable to im-
prisonment
for the same
cause of
action.

SEC. 1153. The plaintiff in the action may at any time order the prisoner to be discharged, and he is not thereafter liable to imprisonment for the same cause of action.

Plaintiff to
advance
funds for
support of
prisoner.

SEC. 1154. Whenever a person is committed to jail on an execution issued on a judgment recovered in a civil action, the creditor, his agent or attorney, must advance to the jailer, within twenty-four hours after such commitment, sufficient money to pay for the support of said prisoner during the time for which he may be imprisoned; and in case the money should not be so advanced, or if,

during the time the prisoner may be in confinement, the money should be expended in the support of such prisoner and the creditor should neglect for twenty-four hours to advance such further sum as might be necessary for his support, the jailer must forthwith discharge such prisoner from custody; and such discharge has the same effect as a discharge by order of the creditor.

CHAPTER IV.

SUMMARY PROCEEDINGS FOR OBTAINING POSSESSION OF REAL PROPERTY IN CERTAIN CASES.

SECTION 1159. Forcible entry defined.

1160. Forcible detainer defined.

1161. Unlawful detainer defined.

1162. Service of notice.

1163. County courts have jurisdiction.

1164. Parties defendant.

1165. Parties generally.

1166. Complaint. Judge to fix day for appearance of defendant and summons.

1167. Summons, form and service of.

1168. Arrest.

1169. Judgment by default.

1170. Defendant may appear, etc.

1171. Trial by jury.

1172. Showing required of plaintiff in forcible entry or detainer. Of defendant.

1173. Complaint must be amended in certain cases.

1174. Verdict and judgment.

1175. General provisions.

SEC. 1159. Every person is guilty of a forcible entry who either— Forcible entry defined.

1. By breaking open doors, windows or other parts of a house, or by any kind of violence or circumstance of terror, enters upon or into any real property; or,

2. Who, after entering peaceably upon real property by force, threats or menacing conduct, turns out the party in possession.

Statutes of 1866. p. 768.

SEC. 1160. Every person is guilty of a forcible detainer who either— Forcible detainer defined.

1. By force, or by menaces and threats of violence,

unlawfully holds and keeps the possession of any real property, whether the same was acquired peaceably or otherwise; or,

2. Who, in the night time, or during the absence of the occupant of any lands, unlawfully enters upon real property, and who, after demand made for the surrender thereof, for the period of five days refuses to surrender the same to such former occupant.

The occupant of real property, within the meaning of this subdivision, is one who, within five days preceding such unlawful entry, was in the peaceable and undisturbed possession of such lands.

Statutes of 1866, p. 768.

Unlawful
detainer
defined.

SEC. 1161. A tenant of real property, for a term less than life, is guilty of an unlawful detainer—

1. Where he continues in possession of the property, or any part thereof, after the expiration of his term, without the permission of the landlord; but in case of a tenancy at will or sufferance, it must be first terminated by notice, as prescribed in the civil code.

2. Where he continues in possession after a neglect or failure to perform the conditions or covenants of the lease or agreement under which the property is held, and three days notice, in writing, requiring the performance of such conditions or covenants, or the possession of the property, shall have been served upon him.

3. Where he continues in possession, without such permission, after default in the payment of rent pursuant to the agreement under which the property is held, and three days notice, in writing, requiring payment of the rent or possession of the property, shall have been served upon him.

Statutes of 1863, p. 652; N. Y. C. C. P. § 1410.

Service of
notice.

SEC. 1162. The notices required by the preceding section may be served, either—

1. By delivering a copy to the defendant personally; or,

2. If he be absent from his place of residence, and from his usual place of business, by leaving a copy with some person of suitable age and discretion at either place; or,

3. If such place of residence and business cannot be ascertained, or a person of suitable age or discretion there cannot be found, then by affixing a copy in a conspicuous

place on the property, and also delivering a copy to a person there residing, if such person can be found.

SEC. 1163. The county court of the county in which the property, or some part of it, is situated, has jurisdiction of proceedings under this chapter.

County courts have jurisdiction.

Statutes of 1866, p. 768.

SEC. 1164. No person other than the actual occupants of the premises are necessary parties defendant to these proceedings, nor will the proceeding abate or plaintiff be nonsuited for the nonjoinder of any persons who might or should have been made parties defendant; but when it appears that any of the parties served with process or appearing in the proceeding are guilty of the offence charged, judgment must be rendered against the persons thus found guilty. And in case a married woman be tenant or occupant, and her husband is not a resident of the county in which the premises are situated, her marriage is no defence; but in case her husband be not joined, or unless she be doing business as a sole trader, an execution issued upon a judgment against her can only be enforced against property on the premises at the time of the commencement of the action.

Parties defendant.

SEC. 1165. Except as provided in the preceding section, the provisions of part two of this code, relating to parties to civil actions, are applicable to this proceeding.

Parties generally.

SEC. 1166. The plaintiff must present to the county judge his written complaint, setting forth therein the facts on which he seeks to recover, and describe the premises with reasonable certainty, and may charge that the defendant has acted fraudulently in making the forcible entry or detainer (in case the proceeding is brought for either), and may claim such damages therefor as he may deem proper, and in case of rent due must state the amount thereof. Upon receiving the complaint the judge must fix a day for the appearance of the defendant in such action, and indorse the date thus fixed, together with the day of the presentation of the complaint, upon it; the judge must also direct upon the complaint that the summons to be issued thereupon be served upon the defendant at a day not less than three days previous to the day set

Complaint.

Judge to fix day for appearance of defendant and summons.

for the appearance of the defendant, and not more than twenty days from the date of making the order, fixing the return day of the summons.

Statutes of 1866, p. 768 ; 1863, p. 652.

Summons,
form and
service of.

SEC. 1167. The complaint, thus indorsed, must be filed with the clerk of the county court, and the clerk must forthwith issue the summons. It must state the parties to the proceeding, the court in which the same is brought, the nature of the proceeding, in concise terms, and the relief sought, and also the day fixed for the appearance of the defendant therein, and the number of days before the time of the appearance that the same is to be served on the defendant. It must notify the defendant to appear and answer within the time designated in the summons, or that the relief sought will be taken against him. The summons must be directed to the defendant, and must be served and returned in the same manner as the summons in a civil action is served and returned.

Statutes of 1866, p. 768.

Arrest.

SEC. 1168. If the complaint presented establishes, to the satisfaction of the judge, fraud, force or violence in the entry or detainer, and that the possession held is unlawful, he may make an order for the arrest of the defendant.

Judgment
by default.

SEC. 1169. If, at the time appointed, the defendant do not appear and defend, the court must enter his default and render judgment in favor of the plaintiff as prayed for in the complaint.

Defendant
may appear,
etc.

SEC. 1170. On or before the day fixed for his appearance, the defendant may appear and answer or demur.

Trial by jury

SEC. 1171. Whenever an issue of fact is presented by the pleadings, if either party demand it, a jury must be summoned to try the issue. The jury must be summoned and formed as in justices' courts, and the provisions of this code, respecting trials by jury in justices' courts, apply to trials by jury under this chapter.

Showing
required of
plaintiff in
forcible
entry or
detainer.

SEC. 1172. On the trial of any proceeding for any forcible entry or forcible detainer, the plaintiff shall only

be required to show, in addition to the forcible entry or forcible detainer complained of, that he was peaceably in the actual possession at the time of the forcible entry, or was entitled to the possession at the time of the forcible detainer. The defendant may show in his defence, that Of defendant he or his ancestors, or those whose interest in such premises he claims, have been in the quiet possession thereof for the space of one whole year together next before the commencement of the proceedings, and that his interest therein is not then ended or determined; and such showing is a bar to the proceedings.

Statutes of 1866, p. 768.

SEC. 1173. When, upon the trial of any proceeding under this chapter, it appears from the evidence that the defendant has been guilty of either a forcible entry or a forcible detainer, and other than the offence charged in the complaint, the judge must order that such complaint be forthwith amended to conform to such proofs. Such amendment must be without any imposition of terms. No continuance must be permitted upon account of such amendment, unless the defendant, by affidavit filed, shows to the satisfaction of the court good cause therefor. Complaint must be amended in certain cases.

SEC. 1174. If, upon the trial, the verdict of the jury or the finding of the court is in favor of the plaintiff and against defendant, the clerk must thereupon enter judgment for the restitution of the premises. The jury, or the court, in case the proceeding is tried without jury, must also assess the damages occasioned to the plaintiff by the forcible entry or detainer, or in case of rent unpaid, the amount of rent then due, and thereupon judgment against the defendant for three times the amount of such damages or rent, as the case may be, so found or assessed, must be entered. Verdict and judgment.

SEC. 1175. The complaint and answer must be verified; and, except as otherwise provided in this chapter, the provisions of this code, relative to proceedings in civil actions, apply to these proceedings; and either party may appeal to the supreme court as from other judgments of the county court; but no appeal taken by the defendant stays proceedings upon the judgment unless the county judge so directs. General provisions

TITLE IV.

OF THE ENFORCEMENT OF LIENS.

CHAPTER I. *Liens in general.*

II. *Liens of mechanics and others upon real property.*

III. *Certain liens for salaries and wages.*

CHAPTER I.

LIENS IN GENERAL.

SECTION 1180. Definition of lien.

Definition
of lien.

SEC. 1180. A lien is a right to have satisfaction of a claim out of a particular thing, or to retain possession of it until the claim is paid.

CHAPTER II.

LIENS OF MECHANICS AND OTHERS UPON REAL PROPERTY.

SECTION 1183. What laborers, contractors, etc., may have liens upon.

1184. Liens for grading and filling lots and streets.

1185. What interest in the land subject to the lien.

1186. Same.

1187. Effect of liens.

1188. Claim of lien to be filed in recorder's office.

1189. Liens upon two or more pieces of property. Amount due from each to be designated.

1190. Claim to be recorded. Fees of recorder.

1191. Time of continuance of lien.

1192. Suits to enforce liens must be tried in district courts. Rules of pleading, etc.

1193. Parties.

1194. What contractor entitled to recover. Owner may retain money, when.

1195. Costs.

1196. Proceeds of sale, how distributed. Execution for deficiency.

1197. Lien does not impair right to proceed for recovery of the debt.

1198. Not to apply to liens already acquired.

1199. New trials and appeals.

SEC. 1183. Every person performing labor upon, or furnishing materials to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, flume, tunnel, fence, machinery, railroad, wagon road, aqueduct to create hydraulic power, or any other structure, or who performs labor in any mining claim, has a lien upon the same for the work or labor done or materials furnished by each respectively, whether done or furnished at the instance of the owner of the building or other improvement, or his agent.

What laborers, contractors, etc., may have liens upon.

Statutes of 1868, p. 589.

SEC. 1184. Any person who, at the request of the owner of any lot in any incorporated city or town, grades, fills in or otherwise improves the same, or the street in front of or adjoining the same, has a lien upon such lot for his work done and materials furnished.

Lien for grading and filling lots and streets.

SEC. 1185. The land upon which any building, improvement or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, is also subject to the liens, if, at the time the work was commenced or the materials for the same had commenced to be furnished, the land belonged to the person who caused said building, improvement or structure to be constructed, altered or repaired; but if such person owned less than a fee simple estate in such land, then only his interest therein is subject to such lien; and in case such interest is a leasehold interest, and the holder thereof has forfeited his right thereto, the purchaser of such building or improvement and leasehold term, or so much thereof as remains unexpired, at any sale under the provisions of this chapter, is held to be the assignee of such leasehold term, and as such is entitled to pay the lessor all arrears of rent or other money and cost due under the lease, unless the lessor has regained possession of the land, or obtained judgment for the possession thereof, prior to the commencement of the construction, alteration or repair of the building or other improvement thereon; in which event the purchaser has the right only to remove the building or other improvement within thirty days after

What interest in the land subject to the lien.

he has purchased the same; and the owner of the land may receive the rent due him, payable out of the proceeds of the sale, according to the terms of the lease, down to the time of such removal.

Same.

SEC. 1186. Every building, improvement or structure, constructed upon any lands with the knowledge of the owner or the person having or claiming any interest therein, is held to have been constructed at the instance of such owner or person having or claiming any interest therein; and the interest owned or claimed is subject to any lien filed in accordance with the provisions of this chapter, unless the owner or person having or claiming an interest therein, within three days after he obtains knowledge of the construction, alteration or repair, or the intended construction, alteration or repair, give notice that he will not be responsible for the same, by posting a notice in writing to that effect in some conspicuous place upon the land.

Effect of
liens.

SEC. 1187. The liens provided for in this chapter are preferred to any lien, mortgage or other encumbrance which may have attached subsequent to the time when the building, improvement or structure was commenced, work done, or materials were commenced to be furnished; also, to any lien, mortgage or other encumbrance which was unrecorded at the time the building, improvement or structure was commenced, work done, or the materials were commenced to be furnished. In enforcing the liens provided for in this chapter, the building, improvement or superstructure may be sold separately from the land; and when so sold, the purchaser may remove the same, within a reasonable time thereafter, not to exceed thirty days, upon the payment to the owner of the land of a reasonable rent for its use from the date of his purchase to the time of removal. If such removal be prevented by legal proceedings, the thirty days for removal do not begin to run until the final determination of such proceedings.

Claim of lien
to be filed in
recorder's
office.

SEC. 1188. Every original contractor, within sixty days after the completion of his contract, and every person, save the original contractor, claiming the benefit of this chapter, must, within thirty days after the com-

pletion of any building, improvement or structure, or after the completion of the alteration or repair thereof, or the performance of any labor in a mining claim, file with the county recorder of the county in which such property, or some part thereof, is situated, a claim containing a statement of his demand after deducting all just credits and offsets, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed, or to whom he furnished the materials, and also a description of the property to be charged with the lien, sufficient for identification, which claim must be verified by the oath of himself or of some other person.

SEC. 1189. In every case in which one claim is filed against two or more buildings, mining claims or other improvements owned by the same person, the person filing such claim must, at the same time, designate the amount due to him on each of such buildings, mining claims or other improvements, otherwise such claim is postponed to other lien-holders. The lien of such claimant does not extend beyond the amount designated, as against other creditors having liens by judgment, mortgage or otherwise, upon either of such buildings or other improvements, or upon the land upon which the same are situated.

Lien upon two or more pieces of property. Amount due from each to be designated.

SEC 1190. The recorder must record the claim in a book kept by him for that purpose, which record must be indexed as deeds and other conveyances are required by law to be indexed, and for which he may receive the same fees as are allowed by law for recording deeds and other instruments.

Claim to be recorded.

Fees of recorder.

SEC. 1191. No lien provided for in this chapter binds any building, mining claim, improvement or structure, for a longer period than ninety days after the same has been filed, unless proceedings be commenced in a proper court within that time to enforce the same; or, if a credit be given, then ninety days after the expiration of such credit; but no lien contingues in force for a longer time than two years from the time the work is completed, by any agreement to give credit.

Time of continuance of lien.

Suits to
enforce liens
must be
tried in dis-
trict courts.
Rules of
pleading,
etc

SEC. 1192. Proceedings to enforce the liens provided for in this chapter must be commenced and tried in the district courts, and the pleadings, process, practice and other proceedings shall be the same as in civil cases, except that where service of summons may be made by publication, the time of publication, where the defendant resides out of or is absent from the state, or for any other cause cannot be served personally, need be but once a week for four successive weeks, and the time for answering expires when such publication is complete.

Parties.

SEC. 1193. In all proceedings to enforce liens provided for by this chapter, all persons personally liable and all lienholders whose claims have been filed for record under the provisions of section eleven hundred and eighty-eight, and all other persons interested in the matter in controversy or in the property sought to be charged with the lien, may be made parties; but such as are not made parties are not bound by such proceedings.

What con-
tractor
entitled to
recover.

SEC. 1194. Any contractor is entitled to recover, upon a lien filed by him, only such amount as may be due to him according to the terms of his contract, after deducting all claims of other parties for work done and materials furnished, and in all cases where a lien is filed for work done or materials furnished to any contractor, he must defend any action brought thereupon at his own expense; and during the pendency of such action the owner may withhold from the contractor the amount of money for which such lien is filed; and in case of judgment against the owner or his property upon the lien, the owner is entitled to deduct from any amount due or to become due by him to the contractor the amount of such judgment and costs; and if the amount of such judgment and costs exceed the amount due by him to the contractor, or if the owner has settled with the contractor in full, he is entitled to recover back from the contractor any amount so paid by him in excess of the contract price, and for which the contractor was originally the party liable.

Owner may
retain money
when.

Costs.

SEC. 1195. Costs may be recovered and made part of the judgment as in civil actions, and the court may also allow, as part of the costs, the moneys paid for filing and recording the lien, and a reasonable attorney's fee.

SEC. 1196. In case the proceeds of any sale are insufficient to pay all lienholders under it, the liens of all persons other than the original contractor and sub-contractors must first be paid in full, or *pro rata*, if the proceeds be insufficient to pay them in full; and out of the remainder, if any, the sub-contractors must then be paid in full, or *pro rata*, if the remainder be insufficient to pay them in full; and the remainder, if any, must be paid to the original contractor; and each claimant is entitled to execution for any balance due him after such distribution; such execution to be issued by the clerk of the court, upon demand, after the return of the officer making the sale, showing such balance due.

Proceeds of
sale, how
distributed.

Execution
for deficit.

SEC. 1197. Nothing contained in this chapter can be construed to impair or affect the right of any person to whom any debt may be due for work done or materials furnished to maintain a personal action to recover such debt against the person liable therefor; and the person bringing such personal action may take out an attachment therefor, notwithstanding his lien, and in his affidavit to procure an attachment, need not state that his demand is not secured by a lien; but the judgment, if any obtained by the plaintiff in such personal action, cannot be construed to impair or merge any lien held by plaintiff under this chapter.

Lien does not
impair right
to proceed
for recovery
of the debt.

SEC. 1198. Nothing contained in this chapter affects any lien heretofore acquired, but the same may be enforced under the provisions of this chapter; and where proceedings are now pending, they may hereafter be conducted according to its provisions.

Not to apply
to liens
already
acquired.

SEC. 1199. The provisions of title two of this code, relative to new trials and appeals, apply to proceedings under this chapter.

New trials
and appeals.

CHAPTER III.

CERTAIN LIENS FOR SALARIES AND WAGES.

SECTION 1204. Certain persons preferred creditors when assignment of property is made.

1205. Same, against estates.

1206. Same, in cases of execution or attachment.

Certain persons preferred creditors when assignment of property is made.

SEC. 1204. In all assignments of property, made by any person to trustees or assignees, on account of the inability of the person, at the time of the assignment, to pay his debts, or in proceedings in insolvency, the wages of the miners, mechanics, salesmen, servants, clerks or laborers, employed by such person, to the amount of one hundred dollars, and for services rendered within sixty days, are preferred claims, and must be paid by such trustees or assignees before any other creditor or creditors of the assignor.

Statutes of 1868, p. 213.

Same, against estates.

SEC. 1205. In case of the death of any employer, the wages of each miner, mechanic, salesman, clerk, servant and laborer, for services rendered within the forty days next preceding the death of the employer, not exceeding one hundred dollars, rank in priority next after the funeral expenses, expenses of the last sickness, the charges and expenses of administering upon the estate, and the allowance to the widow and infant children, and must be paid before other claims against the estate of the deceased person.

Same, in cases of execution or attachment.

SEC. 1206. In cases of executions, attachments, and writs of a similar nature, issued against any person, miners, mechanics, salesmen, servants, clerks and laborers, who have claims against the defendant for labor done, may give notice of their claim, and the amount thereof, sworn to by the person making the claim, to the officer executing either of such writs, at any time before the actual sale of property levied on; and such officers must pay to such persons, out of the proceeds of the sale, the amount each is entitled to receive for services rendered within the forty days next preceding the levy of the writ, not exceeding one hundred dollars. If any or all of the claims so presented, and claiming preference under this section, are disputed by either the debtor or creditor, the person presenting the same must commence an action within ten days for the recovery thereof, and must prosecute his action with due diligence, or be forever barred from any claim of priority of payment thereof; but in case action is rendered necessary by the act of either debtor or creditor, and judgment be had for the claim, or any part thereof, carrying costs, the costs taxable therein

are likewise a preferred claim, with the same rank as the original claim.

TITLE V.

OF CONTEMPTS.

Section 1209. What acts or omissions are contempts.

1210. Re-entry on property after eviction, when a contempt.

1211. A contempt committed in the presence of the court may be punished summarily. When not so committed, an affidavit or statement shall be made.

1212. A warrant of attachment may issue or a notice to show cause.

1213. Bail may be given by a person arrested under such warrant.

1214. Sheriff must, upon executing the warrant, arrest and detain the person until discharged.

1215. Bail bond, form and conditions of.

1216. Officer must return warrant and undertaking, if any.

1217. Hearing.

1218. Judgment and penalty, if guilty.

1219. If the contempt is the omission to perform any act, the person may be imprisoned until performance.

1220. If a party fail to appear, proceedings.

1221. Illness sufficient cause for non-appearance of party arrested. Confinement under arrests for contempt.

1222. Judgment and orders in such cases final.

Sec. 1209. The following acts or omissions, in respect to a court of justice, or proceedings therein, are contempts of the authority of the court:

What acts or omissions are contempts.

1. Disorderly, contemptuous or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding.

2. A breach of the peace, boisterous conduct or violent disturbance, tending to interrupt the due course of a trial or other judicial proceeding.

3. Misbehavior in office, or other wilful neglect or violation of duty by an attorney, counsel, clerk, sheriff, coroner or other person appointed or elected to perform a judicial or ministerial service.

4. Deceit or abuse of the process or proceedings of the court by a party to an action or special proceeding.

5. Disobedience of any lawful judgment, order or process of the court.

6. Assuming to be an officer, attorney, counsel of a court, and acting as such without authority.

7. Rescuing any person or property, in the custody of an officer by virtue of an order or process of such court.

8. Unlawfully detaining a witness or party to an action while going to, remaining at or returning from the court where the action is on the calendar for trial.

9. Any other unlawful interference with the process or proceedings of a court.

10. Disobedience of a subpoena duly served, or refusing to be sworn or answer as a witness.

11. When summoned as a juror in a court, neglecting to attend or serve as such, or improperly conversing with a party to an action to be tried at such court, or with any other person, in relation to the merits of such action, or receiving a communication from a party or other person in respect to it, without immediately disclosing the same to the court.

12. Disobedience, by an inferior tribunal, magistrate or officer, of the lawful judgment, order or process of a superior court, or proceeding in an action or special proceeding contrary to law, after such action or special proceeding is removed from the jurisdiction of such inferior tribunal, magistrate or officer. Disobedience of the lawful orders or process of a judicial officer is also a contempt of the authority of such officer.

NOTE.—Revised Statutes of Minnesota, chapter 87.

Re-entry on
property
after evic-
tion, when a
contempt.

SEC. 1210. Every person dispossessed or ejected from, or out of, any real property, by the judgment or process of any court of competent jurisdiction, and who, not having right so to do, re-enters into or upon, or takes possession of, any such real property, or induces or procures any person not having right so to do, or aids or abets him therein, is guilty of a contempt of the court by which such judgment was rendered, or from which such process issued. Upon a conviction for such contempt, the court or justice of the peace must immediately issue an alias process, directed to the proper officer, and requiring him to restore the party entitled to the possession of such property, under the original judgment or process, to such possession.

Statutes of 1862, p. 115.

SEC. 1211. (§ 481.) When a contempt is committed in the immediate view and presence of the court, or judge at chambers, it may be punished summarily; for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed. When the contempt is not committed in the immediate view and presence of the court, or judge at chambers, an affidavit shall be presented to the court or judge, of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators, or other judicial officer.

A contempt committed in the presence of the court may be punished summarily.

When not so committed, an affidavit or statement shall be made.

SEC. 1212. (§ 482.) When the contempt is not committed in the immediate view and presence of the court or judge, a warrant of attachment may be issued to bring the person charged to answer, or, without a previous arrest, a warrant of commitment may, upon notice, or upon an order to show cause, be granted; and no warrant of commitment can be issued without such previous attachment to answer, or such notice or order to show cause.

A warrant of attachment may issue or a notice to show cause.

SEC. 1213. (§ 483.) Whenever a warrant of attachment is issued, pursuant to this title, the court or judge must direct, by an indorsement on such warrant, that the person charged may be let to bail for his appearance, in an amount to be specified in such indorsement.

Bail may be given by a person arrested under such warrant

SEC. 1214. (§ 484.) Upon executing the warrant of attachment, the sheriff must keep the person in custody, bring him before the court or judge, and detain him until an order be made in the premises, unless the person arrested entitle himself to be discharged, as provided in the next section.

Sheriff must, upon executing the warrant, arrest and detain the person until discharged.

SEC. 1215. (§ 485.) When a direction to let the person arrested to bail is contained in the warrant of attachment, or indorsed thereon, he must be discharged from the arrest, upon executing and delivering to the officer, at any time before the return day of the warrant, a written undertaking, with two sufficient sureties, to the effect that the person arrested will appear on the return of the warrant and abide the order of the court or judge there-

Bail bond, form and conditions of.

upon ; or they will pay as may be directed, the sum specified in the warrant.

Officer must return warrant and undertaking if any.

SEC. 1216. (§ 486.) The officer must return the warrant of arrest and undertaking, if any, received by him from the person arrested, by the return day specified therein.

Hearing.

SEC. 1217. (§ 487.) When the person arrested has been brought up or appeared, the court or judge must proceed to investigate the charge, and must hear any answer which the person arrested may make to the same, and may examine witnesses for or against him, for which an adjournment may be had from time to time, if necessary.

Judgment and penalty if guilty.

SEC. 1218. (§ 488.) Upon the answer and evidence taken, the court or judge must determine whether the person proceeded against is guilty of the contempt charged, and if it be adjudged that he is guilty of the contempt, a fine may be imposed on him not exceeding five hundred dollars, or he may be imprisoned not exceeding five days, or both.

If the contempt is the omission to perform any act, the person may be imprisoned until performance.

SEC. 1219. (§ 489.) When the contempt consists in the omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he have performed it, and in that case the act must be specified in the warrant of commitment.

If a party fail to appear, proceedings.

SEC. 1220. (§ 491.) When the warrant of arrest has been returned served, if the person arrested do not appear on the return day, the court or judge may issue another warrant of arrest, or may order the undertaking to be prosecuted, or both. If the undertaking be prosecuted, the measure of damages in the action is the extent of the loss or injury sustained by the aggrieved party, by reason of the misconduct for which the warrant was issued, and the costs of the proceeding.

Illness sufficient cause for non-appearance of party arrested.

SEC. 1221. (§ 492.) Whenever, by the provisions of this title, an officer is required to keep a person arrested on a warrant of attachment in custody, and to bring him before a court or judge, the inability, from illness or otherwise, of the person to attend, is a sufficient excuse for not bringing him up ; and the officer must not confine a per-

son arrested upon the warrant in a prison, or otherwise restrain him of personal liberty, except so far as may be necessary to secure his personal attendance.

Confinement
under arrest
for contempt

Sec. 1222. (§ 493.) The judgment and orders of the court or judge, made in cases of contempt, are final and conclusive.

Judgment
and orders in
such cases
final.

TITLE VI.

OF THE VOLUNTARY DISSOLUTION OF CORPORATIONS.

SECTION 1227. How dissolved.

1228. Application, what to contain.

1229. Application, how signed and verified.

1230. Filing application and publication of notice.

1231. Objections may be filed.

1232. Hearing of application.

1233. Judgment roll and appeals.

Sec. 1227. A corporation may be dissolved by the county judge of the county where its office or principal place of business is situated, upon its voluntary application for that purpose.

How dis-
solved.

Sec. 1228. The application must be in writing, and must set forth—

Application,
what to
contain.

1. That at a meeting of the stockholders or members called for that purpose, the dissolution of the corporation was resolved upon by a two-third vote of all the stockholders or members.

2. That all claims and demands against the corporation have been satisfied and discharged.

Sec. 1229. The application must be signed by a majority of the board of trustees, directors or other officers having the management of the affairs of the corporation, and must be verified in the same manner as a complaint in a civil action.

Application,
how signed
and verified.

Sec. 1230. If the judge is satisfied that the application is in conformity with this title, he must order it to be filed with the clerk, and that the clerk give not less than thirty nor more than fifty days notice of the appli-

Filing appli-
cation and
publication
of notice.

cation, by publication in some newspaper published in the county, and if there are none such, then by advertisements, posted up in three of the principal public places in the county.

Objections
may be filed.

SEC. 1231. At any time before the expiration of the time of publication any person may file his objections to the application.

Hearing of
application.

SEC. 1232. After the time of publication has expired, the judge may, upon five days notice to the persons who have filed objections, or without further notice, if no objections have been filed, proceed to hear and determine the application; and if all the statements therein made are shown to be true, he must declare the corporation dissolved.

Judgment
roll and
appeals.

SEC. 1233. The application, notices and proof of publication, objections (if any) and declaration of dissolution, constitute the judgment roll, and from the judgment an appeal may be taken as from judgments of the county courts.

TITLE VII.

EMINENT DOMAIN—SPECIAL PROCEEDINGS TO EXERCISE RIGHT OF.

SECTION 1237. Eminent domain defined.

1238. Parties who may exercise the right of eminent domain.

Purposes for which it may be exercised.

1239. Classes of estates or interests subject to condemnation.

1240. Private property defined. Classes enumerated.

1241. Facts necessary to be found by court before condemnation.

1242. Parties may make location. May enter to make surveys.

Liable for unnecessary injury.

1243. Jurisdiction in district court. Complaint, its contents and verification.

1244. Summons, what to contain. How issued and served.

1245. Who may defend. What the answer may show, and how verified.

1246. Rules of practice.

1247. Court shall have jurisdiction to regulate the mode of making crossings or of enjoying limited, separate or common use. Of location of right of way in extreme cases.

SECTION 1249. Appointment of commissioners.**1249. Duties and powers of commissioners.****1250. Duties and powers of commissioners, continued.****1251. The date of service of summons, or appearance, determines the time of the accruing of damages.****1252. Commissioners to file report.****1253. Cannot decide upon conflicting claims. Such claims left to the court.****1254. Clerk to notify parties of filing of report.****1255. Motion to set aside report. Recommitment to another commission.****1256. Report confirmed by court.****1257. Trial by jury, if demanded.****1258. Amendments. Costs.****1259. New proceedings to cure defective title.****1260. Payment of damages.****1261. Final order of condemnation, what to contain. When filed, title vests.****1262. Proceeding in court or chambers.****1263. Appeals, how taken.****1264. Putting plaintiff in possession.**

NOTE.—In order to establish one uniform mode of proceeding in effectuating the right of eminent domain, it is found necessary to more clearly exhibit the right and the classes of cases to which it may be applied.

SEC. 1237. Eminent domain is the sovereign right of taking private property for public use, upon making just compensation therefor. Such right may be exercised in the manner provided in this title.

Eminent domain defined.

Const. art. 1, § 8.

3 Cal. 69, Surocco et al. vs. J. W. Geary.

4 Cal. 114, City of San Francisco vs. Scott.

5 Cal. 373, People vs. Folsom.

6 Cal. 74, Sacramento Valley R. R. Co. vs. Moffatt.

7 Cal. 121, McCann vs. Sierra County.

7 Cal. 577, Sacramento Valley R. R. Co. vs. Moffatt.

9 Cal. 595, Colton et al. vs. Rossi et al.

12 Cal. 500, McCauley vs. Weller et al.

13 Cal. 306, Bensley et al. vs. Mountain Lake Water Co.

14 Cal. 106, Johnson vs. Alameda County.

16 Cal. 153, Gillan vs. Hutchinson et al.

16 Cal. 243, Koppikus vs. State Capitol Commissioners.

18 Cal. 229, Gilmer vs. Lime Point.

19 Cal. 47, Gilmer vs. Lime Point.

19 Cal. 579, The People ex rel. Heyneman vs. Blake County Judge.

22 Cal. 251, Harper vs. Richardson et al.

22 Cal. 434, Spring Valley Water Works vs. San Francisco et al.

23 Cal. 323, Contra Costa Coal Mines R. R. Co. vs. Moss et al.

- 24 Cal. 427, Curran vs. Shattuck.
 27 Cal. 171, State Prison Directors vs. Geo. A. Worn et al.
 27 Cal. 613, Creighton vs. Hanson.
 27 Cal. 643, Leach vs. Day.
 28 Cal. 345, Emery vs. San Francisco Gas Co.
 28 Cal. 662, Lincoln vs. Colusa County.
 29 Cal. 75, Emery vs. Bradford.
 29 Cal. 112, San Francisco and San José R. R. Co. vs. D. Mahoney et al.
 29 Cal. 123, Walsh vs. Mathews.
 31 Cal. 406, Grigsby vs. Burtnett, Supervisor.
 31 Cal. 215, Lake Merced Water Co. vs. Cowles, County Judge.
 31 Cal. 367, San Francisco, Alameda and Stockton R. R. Co. vs. Caldwell.
 31 Cal. 538, Fox vs. Western Pacific R. R. Co.
 32 Cal. 241, Sherman vs. Buick.
 32 Cal. 499, North Beach and Mission R. R. Co.
 36 Cal. 639, The San Francisco and Alameda Water Co. vs. Alameda Water Co.
 American authorities cited in Bouvier's Law Dictionary ;
 title "Eminent Domain," 3—12th edition.

NOTE.—The following was the first draft of section 1237, and was intended as a legislative declaration, settling, as far as practicable, the doubts manifested in *Gilmer vs. Lime Point* (18 Cal. 229) :

"Sec. 1237. Eminent domain is the sovereign right of a people to take private property for public use, paying just compensation therefor. This right exists in the limited sovereignty of the federal government as well as in the more general sovereignty of the states. Pertaining to the former, the public use must be within the scope of its limited powers, and necessary for their preservation ; but cannot be exercised for the enlargement of such powers, or in derogation of the reserved sovereign rights of states. The right of eminent domain in each is commensurate with the extent of their respective sovereign powers. The mode of effectuating such right shall be by special proceedings, as prescribed in this title, and not otherwise."

Parties who may exercise the right of eminent domain.

Purposes for which it may be exercised.

Sec. 1238. The right of eminent domain may be exercised in the names of the following parties, subject to the provisions of this title :

1. The United States : For the erection of fortifications, magazines, arsenals, navy yards, naval and military stations, light-houses, range and beacon lights ; also, for facilitating coast surveys.

Statutes of 1859, p. 26 ; 1852, p. 147 ; People vs. Folsom, 5 Cal. 373 ; Gilmer vs. Lime Point, 18 Cal. 229.

2. The state of California : For necessary public buildings and grounds and for all other public uses authorized by law.

Koppikus vs. State Capitol Commissioners, 16 Cal. 248;
State Prison Directors vs. George A. Worn et al. 27
 Cal. 171.

3. Counties, cities, villages and towns: For public buildings and grounds which they are required to provide; also, for canals, aqueducts, ditches, flumes or pipes, for conducting water for the use of their inhabitants, or for drainage; also, for raising embankments, removing obstructions, widening, deepening and straightening channels of streams; also, for roads, streets and alleys; but the extent of the power and the mode of apportioning, levying, assessing and collecting the compensation, or raising money and equalizing taxation therefor, or distributing the burdens thereof, shall be controlled by the laws pertaining thereto in the respective municipal corporations.

Purposes for
 which it may
 be exercised.

Statutes of 1850, p. 87; 1856, p. 198; 1870, p. 763; 1868, p. 507; *Sherman vs. Buick et al.* 32 Cal. 241; *Creighton vs. Manson*, 27 Cal. 613; *Emery vs. San Francisco Gas Co.* 28 Cal. 345; *Emery vs. Bradford*, 29 Cal. 75.

4. Persons or corporations: For wharves, ferries, bridges, toll roads, plank and turnpike roads, railroads and horse or street railroads; also, for canals, ditches, flumes, aqueducts and pipes for public transportation, or for supplying mines, cities, towns or farming neighborhoods with water, or for draining and reclaiming swamp and overflowed lands.

Statutes of 1864, p. 192; 1853, p. 169; 1861, p. 619; 1853, p. 87; 1858, p. 218; 1862, p. 540; 1868, p. 507.

5. Mine owners: For roads, tunnels, ditches and flumes necessary for the working of mines; for dumping purposes; also, for use, in common with the possessors thereof, of any natural outlet from mines, for conducting the tailings and refuse matter therefrom, when it can be done without great and unreasonable injury to those owning mines or lands upon such natural outlet.

Statutes of 1870, p. 569.

6. One or more persons: For by-roads, in connection with some public road.

Statutes of 1861, p. 389; *Sherman vs. Buick et al.* 32 Cal. 241.

7. All parties above mentioned: For all necessary appendant buildings and uses, in like manner as the princi-

Purposes for
which it may
be exercised.

pal use to which they are to be attached, or in connection with which they are to be used.

Statutes of 1861, p. 607, § 20.

8. All parties for whom, and in all other cases for which, the legislature shall have first given its consent, or declared the taking of private property expedient, if for a public use.

NOTE.—Subdivision 1 is intended to cover all cases that may arise in which the federal government demands condemnation, without determining the source from whence the right emanates. If it emanates from the limited sovereignty of the federal government, and authority is given by act of congress to assert it, then the state offers these special proceedings as a mode of effectuating the right; or, if the right is in the state, as claimed in *Gilmer vs. Lime Point* (18 Cal. 229, left undecided), and the state authorizes the United States to effectuate it, then these proceedings supply the remedy.

Subdivision 3 supplies a mode for taking property for town purposes, required by section 6 of an act to provide for incorporation of towns, no mode having been provided therefor (Stat. 1856, p. 198). It supersedes sections 14, 15, 17 and 18 of an act to provide for the incorporation of cities (Stat. 1850, p. 87). It supersedes, also, all similar provisions in the more general laws concerning roads and highways; also, in the numerous special laws pertaining to the same in cities and counties. The last clause makes *general* a power conferred on the supervisors of Santa Clara county (Stat. 1870, p. 763), and incorporates it in these proceedings.

Subdivision 4 supersedes sections 9 and 10 of an act concerning public ferries and toll bridges, as amended in 1864 (Stat. 1864, p. 192); also, section 15 of corporation act, concerning plank and turnpike roads (Stat. 1853, p. 169). Sections 24 to 39, inclusive, of the railroad law, are adopted as a basis of the plan of proceedings provided in this title, and will of course be superseded. The substantial features of these sections are preserved, and only modified where necessary to give perspicuity and to make them general, or adaptable to *all* cases of condemnation (Stat. 1861, pp. 619-622). There appears to be no mode of taking property for wharfing or docking, being public uses mixed with several private callings, in the act to provide for the formation of corporations for certain purposes (Stat. 1853, p. 87). This subdivision supplies the defect. It also supersedes sections 1 and 2 of an act to provide for the incorporation of water companies. These sections adopt, by reference, the mode of proceedings for taking private property provided for in the railroad law of 1853. That law has since been repealed—in existence only for the purpose of ascertaining damages arising from location of water works, ditches, flumes, etc. (Stat. 1858, p. 218). Canal companies are referred to the railroad law of 1861 (p. 607) for their mode of

obtaining the right of way (Stat. 1862, p. 540). It also supersedes the special proceedings for acquiring right of way in reclaiming swamp lands (Stat. 1868, p. 517, § 38).

Subdivision 5: mining companies are included in the act to provide for the formation of corporations for certain purposes; but the right of way is not there conferred, but it is conferred in an act to regulate the rights of the owners of mines (Stat. 1870, p. 569), as is also the mode of proceedings. The rights contained in that act are sought to be condensed into this subdivision and the remedy provided by this title.

Subdivision 6 supersedes a part of section 7 (Stat. 1861, p. 392), which prescribes the mode of laying out private roads. This clause has been drawn to make it conformable to the decision in 32 Cal. 241. The power has been taken from the supervisors, as the county does not bear the burden. It is *private* so far as cost of proceedings and damages are concerned.

Subdivision 7 embraces, in the term "appendant buildings and uses," the great array of enumerated uses in railroad law, as "stations, depots, culverts, embankments, switches," etc., and extends the rule or right and makes it common to all cases where appendages are required.

Subdivision 8 recognizes the fact that in the progress of the age other uses and parties than those enumerated may require private property for public uses; in which event a legislative declaration to that effect authorizes its condemnation, if for a public use.

SEC. 1239. The following is a classification of the interests, estates and rights in lands, subject to be taken for public use.

Classes of
estates or
interests sub-
ject to con-
demnation.

1. A fee simple, when taken for public buildings or grounds, or for permanent buildings for use in connection with a right of way.

2. An easement, when taken for a highway, toll road, railroad, bridge, ferry or other right of way. The term of the easement may be limited by the law establishing it or it may be perpetual; and in either case it may be determined by abandonment. In such cases the land shall be used only for the purposes for which it shall have been taken, and when abandoned for such purposes its use shall revert to the owners of the fee.

3. The right of entry upon and occupation of lands, and the right to take therefrom such earth, gravel, stones, trees and timber as may be necessary for some public use.

Private property defined.

SEC. 1240. Private property, as used in this title, means all property, real or personal, corporeal or incorporeal, which does not belong to the party demanding condemnation, and is enumerated as follows:

Classes enumerated.

1. Lands belonging to the United States or this state, or any county, town or city therein, or to any person or private corporation, not already occupied or employed for a public use.

2. Property once condemned for public use may again be condemned for a more necessary public use; also, property held for such use, but obtained by other means, may be taken for a more necessary public use.

San Francisco and Alameda Water Co. vs. Alameda Water Co. 36 Cal. 639.

3. Franchises for toll roads, toll bridges and ferries, and all other franchises, and the rights and property belonging thereto, when necessary for free highways or railroads, or other more necessary public use.

6 How. 529.

4. All rights of way for any and all the purposes mentioned in section twelve hundred and thirty-eight, and any and all structures and improvements thereon, and the lands held or used in connection therewith, shall be subject to be connected with, crossed or intersected by any other right of way or improvements or structures thereon. They shall also be subject to a limited use, in common with the owner thereof, or to a limited special, separate use, when indispensably necessary; but such uses, crossings, intersections and connections shall be made in manner most compatible with the greatest public benefit and least private injury.

5. All classes of private property not enumerated may be taken for public use, when such taking is authorized by law.

Contra Costa Coal Mines R. R. vs. Moss et al. 23 Cal. 323.

Facts necessary to be found by court before condemnation.

SEC. 1241. In no case shall private property be taken under this title, until the court shall find—

1. That the legislature has given its consent to, or declared expedient, such taking.

2. That the use for which it is required is a public use.

Gilmer vs. Lime Point, 18 Cal. 229; Contra Costa Coal Mines R. R. vs. Moss et al. 23 Cal. 323.

3. If already employed for public use, that the purpose for which it is required is a more necessary public use.

6 How. 529.

4. If the plaintiff is not a political or municipal corporation, then, with respect to each parcel, that an actual effort has been made by offer and it cannot be obtained by purchase, or that it cannot be so obtained without the payment of an unreasonable price; or that the owners have not legal capacity to convey; or that there are adverse or conflicting claimants to the property.

Gilmer vs. Lime Point, 19 Cal. 47; *Contra Costa Coal Mines R. R. vs. Moss et al.* 23 Cal. 323; *Lincoln vs. Colusa County*, 28 Cal. 662.

NOTE 1.—It is not intended, by the second and third requirements, to change the rule as to the force and effect that courts will give to a legislative declaration of "public use" or "public convenience."

NOTE 2.—We are aware that this condition precedent—a failure to purchase for a reasonable price—is objected to by some. It may be a little inconvenient in practice, but it is a security to the citizen against being unreasonably drawn into court. There is a little peril on both sides, which is conducive to just results. The plaintiff cannot commence without showing a reasonable offer, and the defendant must suffer his loss of time, cost of attorney, and all expenses over taxable costs, if he does not accept the offer. Most of the existing plans of condemnation require this condition. If it were to be abrogated, then the defendant's attorneys' fees, and all reasonable expenses over taxable costs, should be added in the assessment of damages. Municipal corporations are excepted, and will be provided for in other laws.

SEC. 1242. In all cases, parties authorized to enforce the right of eminent domain have the authority to survey and locate the property required; but it shall be located in manner most compatible with the greatest public benefit and least private injury, and subject to the provisions of section twelve hundred and forty-seven. Such parties may enter upon the property and make examinations, surveys and maps thereof, and such entry shall constitute no cause of action in favor of the owner of the property; but such parties shall be liable to the owners for all damage caused by the negligent, wanton or malicious conduct of themselves, their agents or servants.

Parties may make location.

May enter to make surveys.

Liable for unnecessary injury.

Statutes of 1861, p. 618, § 22.

Jurisdiction
in district
court.

SEC. 1243. The district court has exclusive jurisdiction of these proceedings. They must be commenced by filing a complaint in the county where the property is situated, showing—

Complaint,
its contents
and verifica-
tion.

1. The right of plaintiff to commence the proceedings; also, the performance of all preliminary acts and conditions required by law.

2. When right of way is sought, the location, general route, termini, surveys and maps thereof.

3. A description of each parcel of property.

4. The names of respective owners and claimants of such property, or that they are unknown.

All parcels of property lying within the county, and required for the same public use, may be included in either one complaint or in several. The court may consolidate or separate the cases. The complaint must be verified in like manner as complaints in civil actions.

Statutes of 1861, p. 619, § 24; Contra Costa Coal Mines R. R. vs. Moss et al. 23 Cal. 323; State Prison Directors vs. George A. Worn et al. 27 Cal. 171; Lincoln vs. Colusa County, 28 Cal. 662; San Francisco and Alameda Water Co. vs. Alameda Water Co. 36 Cal. 639.

Summons,
what to
contain.

SEC. 1244. The clerk must issue a summons, containing the names of the known owners, a general description of the whole property, and a statement of the public use for which it is sought to be condemned, and make reference to the complaint for description of the respective parcels, and notifying the owners and claimants, as parties defendant, to appear and show cause why the property described should not be condemned as prayed for in the complaint. In all other particulars it must be in the form of a summons in civil actions, and must be served in like manner.

How issued
and served.

Statutes of 1861, p. 620, § 27.

Who may
defend.

SEC. 1245. All persons occupying, or having or claiming an interest in any of the property described in the complaint, or in the damages for the taking thereof, though not named, may appear, demur, answer and defend, each in respect to his own property or interest, or that claimed by him, in like manner as if named in the complaint. The answer must be verified in like manner as the complaint.

What the
answer may
show, and
how verified.

Statutes of 1861, p. 620, §§ 25-28.

SEC. 1246. The provisions of this code, so far as they are applicable, and not inconsistent with the provisions of this title, constitute the rules of practice in these proceedings.

Rules of
practice.

SEC. 1247. The court has power—

1. To regulate and determine the place and manner of making connections and crossings, or of enjoying the separate or common use mentioned in the fourth clause of section twelve hundred and forty.

Court shall have jurisdiction to regulate the mode of making crossings or of enjoying limited, separate or common use. Of location of right of way in extreme cases.

2. To change the location of any right of way upon a showing of unnecessary injury, when such change will make it more compatible with the greatest public convenience and least private injury.

3. To hear and determine all adverse or conflicting claims to the property sought to be condemned, and to the damages therefor.

4. To determine the respective rights of different parties seeking condemnation of the same property.

San Francisco and Alameda Water Co. vs. Alameda Water Co. 36 Cal. 639; Sacramento Valley vs. Moffatt, 7 Cal. 577; Spring Valley Water Works vs. San Francisco et al. 22 Cal. 434; San Francisco and San José R. R. vs. David Mahoney et al. 29 Cal. 112; Lake Merced Water Co. vs. Cowles, County Judge, 31 Cal. 215.

SEC. 1248. Upon the hearing, after the court finds the facts required to be shown by sections twelve hundred and forty-one and twelve hundred and forty-three, it must, if a jury trial is not demanded, as provided in section twelve hundred and fifty-seven, appoint three intelligent, competent and disinterested persons as commissioners, to ascertain and assess the compensation to be paid to the persons having interests in the property described in the complaint. The court must increase the number to five, upon the application of either party. They must have the qualifications of jurors, and are subject to be examined and challenged in like manner and to such number as jurors in civil actions. One or more commissioners, with like qualifications and subject to like examination and challenges, may be appointed by the court to fill any vacancy occurring, upon such notice being given as the court may direct.

Appoint-
ment of com-
missioners.

Statutes of 1861, p. 620, § 28 ; *Koppikus vs. State Capitol Commissioners*, 16 Cal. 248.

NORM.—Jury trial: Our legal critics are two classes of thinkers—one class desires the greatest facilities for taking private property for public use without sufficient regard for the citizen; the other is a little disposed to be too exacting for the citizen, thus trammeling public enterprise. The former discard the idea of jury trials in the assessment of damages. The latter discard the idea of assessment by commissioners appointed by the court. The plan of our commission is to make the assessment by commissioners the *ordinary* mode, but to preserve the right of demanding a *drawn* jury, when parties believe that they have extraordinary causes for it. We undertake to make a judicious combination of both plans.

Duties and powers of commissioners.

SEC. 1249. The court must appoint the time and place for the first meeting of the commissioners, and for filing their report, and may give such further time as may be necessary for that purpose. The commissioners, or a majority of them, must meet at the time and place so appointed, and, before entering on their duties, must be sworn to honestly, faithfully and impartially perform their duties; any one of them may issue subpoenas for witnesses on behalf of either of the parties, and administer oaths, and they may adjourn from place to place, and from time to time, as may be necessary for the proper discharge of their duties.

Statutes of 1861, p. 620, § 29.

Same.

SEC. 1250. The commissioners must view the property described in the complaint, and hear such testimony as may be offered by any of the parties to the proceedings, and ascertain and assess—

Statutes of 1861, p. 620, § 30 ; 1868, p. 705 ; 1863, p. 610 ; 1870, p. 227.

1. The value of the property sought to be condemned, and of each and every separate estate or interest therein, separately.

2. If the property sought to be condemned constitutes only a part of a larger parcel, they shall next assess the damages which will accrue to the owner by reason of its severance from the portion not sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff, but shall allow no damages constructively arising from competition produced by the im-

provement proposed to be constructed by the party seeking the condemnation. Same.

NOTE.—See *California Pacific R. R. Co. vs. Central Pacific R. R. Co.*, by Dwinelle, judge fifteenth district court, sitting for the sixth district judge, Sacramento county.

3. Separately, how much the portion not sought to be condemned, and each estate or interest therein, will be benefited, if at all, by the construction of the improvement proposed by the plaintiff; and if the benefits equal the damages assessed, the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if the benefits are less than the damages, the former must be deducted from the latter, and the remainder shall be the only damages allowed.

4. If the property sought to be condemned be for a railroad, the commissioners, in assessing damages, must include the cost of good and sufficient fences along the line of the railroad, and the cost of cattle guards where fences may cross the line of such railroad, unless plaintiff shall have offered or agreed in the complaint to construct the same; in which case the cost thereof must not be included in the damages. If the land be uninclosed, the plaintiff shall not be required to construct fences and cattle guards until the owner of the land shall have constructed fences abutting upon said railroad.

Sacramento Valley R. R. Co. vs. Moffatt, 6 Cal. 74; *Kopikus vs. State Capitol Commissioners*, 16 Cal. 248; *Spring Valley Water Works vs. San Francisco et al.* 22 Cal. 434; *Curran vs. Shattuck*, 24 Cal. 427; *Creighton vs. Manson*, 27 Cal. 613; *San Francisco and San José R. R. Co. vs. David Mahoney et al.* 29 Cal. 112; *San Francisco, Alameda and Stockton R. R. Co. vs. Caldwell*, 31 Cal. 367; *Central Pacific R. R. Co. vs. Pearson et al.* 35 Cal. 247.

5. The commissioners must, as far as practicable, assess compensation for damages arising from each source of damage separately; and on request of either party, must state the principle upon which such compensation is assessed, and note all exceptions taken by either party.

SEC. 1251. The date of the service of the summons, or the date of an appearance in the proceedings when there has been no service of summons, is the time to which reference must be had in fixing the value of prop-

The date of service of summons, or appearance, determines the time of the accruing of damages.

erty or the amount of damages of each defendant or interpleader. No improvements put upon the land, subsequent to the date of such service or appearance, shall be included in the assessment of damages.

Commissioners to file report.

SEC. 1252. On or before the time appointed by the court, or to which it may be postponed, the commissioners must file their report, signed by them and containing a full account of their proceedings, including the testimony taken by them and their rulings upon the admission or exclusion of testimony. The commissioners may include all parcels of property in one report, or they may make several reports, including one or more parcels, at their option, unless otherwise directed by the court.

Cannot decide upon conflicting claims.

SEC. 1253. The commissioners must not determine adverse or conflicting claims; but the parties asserting such claims, if they have answered or interpleaded, may appear before the commissioners with the same rights as other defendants, and the court must hear and determine their respective rights to the damages assessed in such cases. If the report of the commissioners shall have been confirmed before such adverse or conflicting claims are determined, the plaintiff may pay the sum, awarded by the commissioners, to the clerk, to abide the order of the court upon the final determination of such conflicting claims, and plaintiff shall not be liable for any costs which may be caused by such litigation. If the award exceeds the penal sum of the clerk's official bond, the amount only of such bond shall be paid to the clerk, and approved bond must be given for such excess.

Such claims left to the court.

Clerk to notify parties of filing of report.

SEC. 1254. Immediately after the filing of the report, the clerk must, in writing, notify all the parties to the proceedings, who have appeared, of the time of such filing.

Statutes of 1861, p. 620, § 30; 1868, p. 705.

Motion to set aside report.

SEC. 1255. The plaintiff or any of the defendants may, within twenty days after the filing the report, if it be filed on the day appointed by the court, or within twenty days after notice of the filing, if it be filed before the day appointed by the court, and after ten days notice to the parties interested, move to set it aside, and to have a new trial as to all or any parcel or interest; and upon good

cause shown, the court must set it aside as to all or any parcel or interest, and may, if a jury trial is not demanded, as provided in section twelve hundred and fifty-seven, recommit the matter to the same or to other commissioners, who must proceed in like manner as those first appointed; but such matter must not be recommitted more than once. The entire report of the commissioners, including the testimony and exceptions, is the statement on such motion, and may be used and read thereon. The notice of the motion to set aside the report must contain a statement of the points upon which the motion is based.

Recommitt-
ment to
another
commission.

Statutes of 1861, p. 621, § 31; 1870, p. 227; Central Pacific R. R. Co. vs. Pearson et al. 35 Cal. 247.

SEC. 1256. If no motion for a new trial has been made for the purposes, within the time fixed, and in the manner provided in the preceding section, the court must confirm the report by its judgment.

Report
confirmed
by court.

Statutes of 1861, p. 621, § 32.

SEC. 1257. Any party to the proceedings may demand that the damages, in which such party is interested shall be ascertained by a jury, but such demand must be made before the appointment of commissioners, or within five days after granting a new trial, and before recommitment to the same or another commission. In such case, a jury is ordered and impanelled in the manner and with like qualifications as in civil actions, and the proceedings upon the trial must be the same as in civil actions, but subject to the provisions applicable to commissioners in section twelve hundred and fifty. The court must render its judgments as upon verdicts in civil actions.

Trial by jury
if demanded.

Statutes of 1852, p. 149, § 1; Koppikus vs. State Capitol Commissioners, 16 Cal. 248.

NOTE.—The right to a jury trial should either be expunged from the act of 1852 (p. 149) or should be extended to all cases.

SEC. 1258. The court may make all orders necessary or proper, and cause the pleadings and proceedings to be amended whenever justice requires it to be done. Costs are taxed at the rates prescribed in the fee bill for the county in civil actions, and must be paid by the plaintiff.

Amendm'nts

Costs.

If the defendant moves for a new trial, and it is had, either by jury or commissioners, and the compensation assessed on such new trial is not greater than the previous assessment, then the defendant must pay costs of such new trial; if the increase does not exceed it ten per cent., each party shall pay his own costs; if over ten per cent., the plaintiff must pay all costs of all trials.

Statutes of 1861, p. 621, § 33; *Contra Costa Coal Mines R. R. vs. Moss et al.* 23 Cal. 323.

New proceedings to cure defective title.

SEC. 1259. If the title acquired, or attempted to be acquired, is found to be defective from any cause, the plaintiff may again institute proceedings to acquire the same, as in this title prescribed.

Statutes of 1861, p. 621, § 34.

Payment of damages.
N. S.

SEC. 1260. The plaintiff must, within thirty days after final judgment, pay the sum of money awarded, and costs. This payment may be made to the defendants, respectively, or deposited in such bank as the court may direct, to the credit of the defendants respectively entitled thereto, to be drawn out only on the order of the defendants, respectively, indorsed by the court or judge. If the judgment be not so paid or deposited, the court, upon a showing of such fact, must set aside and annul the entire proceedings and restore to defendants possession of any property taken from them by the plaintiff, and the defendants shall have execution against the plaintiff for double all their respective costs incurred in the proceedings, and may maintain joint or several actions against the plaintiff for all damages sustained by reason of such proceedings and failure to pay the damages awarded.

Statutes of 1861, p. 622, § 36; *San Francisco and San José R. R. Co. vs. David Mahoney et al.* 29 Cal. 112.

Final order of condemnation, what to contain.

When filed, title vests.

SEC. 1261. When payments have been made, or deposited, as required by the preceding section, the court must make a final order of condemnation, which shall describe the property condemned and the purposes of such condemnation. A copy of the order must be filed in the office of the recorder of the county, and thereupon the property described therein is vested in the plaintiff for the purposes therein specified.

Statutes of 1861, p. 621, §§ 33-35; Grigsby vs. Burtnett, Supervisors, 31 Cal. 406; Fox vs. Western Pacific R. R. Co. 31 Cal. 538.

Sec. 1262. All proceedings provided for in this title may be had before the court, or before the judge thereof at chambers. The proceedings had before the judge must be entered of record by the clerk, as if had before the court.

Proceedings
in court or
chambers.

Sec. 1263. Appeals may be taken from orders overruling demurrers, motions for new trials, and from the final judgment, to the supreme court, by any of the parties. The appeal must be taken and perfected within the times, and prosecuted, heard and determined in like manner, in all respects, as appeals from orders and judgments of the district court in civil actions.

Appeals,
how taken.

Sec. 1264. Whenever it appears, during the pendency of proceedings, that the public welfare requires that the plaintiff be let into possession of the property before the final assessment of damages, the court must, upon notice, inquire summarily as to the probable amount of the damages, and may view the premises and examine parties and witnesses, and hear affidavits concerning the same, and make proximate assessments of the damages; and upon payment of the several amounts to the parties entitled thereto, or into bank, as provided in section twelve hundred and sixty, in cases where there are conflicting claimants to the property or to the damages, the court may authorize the plaintiff to take possession of and use the property. Such assessments must not prejudice either party in the further investigation of such damages, or in obtaining proper judgments for their final adjustments.

Putting
plaintiff in
possession.

Statutes of 1863, p. 610.

4 Cal. 114, City of San Francisco vs. Scott.

7 Cal. 121, McCann vs. Sierra County.

7 Cal. 577, Sacramento Valley R. R. Co. vs. Moffatt.

9 Cal. 595, Colton et al. vs. Rossi et al.

12 Cal. 500, McCauley vs. Weller et al.

13 Cal. 307, Bensley vs. Mountain Lake Water Co.

14 Cal. 106, Johnson vs. Alameda County.

18 Cal. 229, Gilmer vs. Lime Point.

23 Cal. 323, Contra Costa Coal Mines R. R. vs. Moss et al.

24 Cal. 427, Curran vs. Shattuck.

31 Cal. 406, Grigsby vs. Burtnett, Supervisors.

31 Cal. 538, Fox vs. Western Pacific Railroad.

NOTE.—In the first draft, the following section stood as alternate for the last section in the present text :

“**Sec. 1264.** At any stage of the proceedings, the court may authorize the plaintiff, if already in possession, to continue therein ; and if not, then to take possession of and use the property during the pendency and until the final conclusion of such proceedings, and may stay all actions and proceedings against the plaintiff on account thereof ; but the plaintiff must pay a sufficient sum into court, or give security, to be approved by such court or judge, to pay, as well the compensation in that behalf when ascertained, as all damages which may be sustained by the defendant, if for any cause the property is not finally taken for public use.”

This section is the amendment of 1863, of section 34 of the railroad act of 1861. The remainder of that section stands as section 1259 of this title. This amendment has been detached and retained in this note. It was *special* to right of way for *railroads*. It should be extended to *all* rights of way, or should be modified so as to furnish a common rule or basis for all. The last section of the text is presented by the commissioners for this purpose.

TITLE VII.

OF EMINENT DOMAIN.

SECTION 1237. Eminent domain defined.

1238. Purposes for which it may be exercised.

1239. What estates in land may be acquired by condemnation.

1240. Private property defined. Classes enumerated.

1241. Facts necessary to be found by court before condemnation.

1242. Parties may make location. May enter to make surveys.

1243. Jurisdiction in district court. Complaint, its contents and verification.

1244. Summons, what to contain. How issued and served.

1245. Who may defend. What the answer may show, and how verified.

1246. Court shall have jurisdiction to regulate the mode of making crossings or of enjoying a common use.

1247. Court or jury to assess damages.

1248. The date with respect to which compensation shall be assessed, and the measure thereof.

1249. New proceedings to cure defective title.

1250. Payment of damages.

1251. Final order of condemnation, what to contain. When filed, title vests.

1252. Putting plaintiff in possession.

1253. Rules of practice.

NOTE.—The draft of title seven prepared by my associate, Mr. C. Lindley, precedes this. Although in many respects he has materially modified it since the first draft, yet I am unable to assent to it as a whole. I therefore submit the following title as a substitute. Under each section I have noted my objections to the corresponding section drafted by my associate. C. H.

SEC. 1237. Eminent domain is the right of the people or government to take private property for public use. This right may be exercised in the manner provided in this title. Eminent domain defined

NOTE.—The only material difference between this section and the corresponding section reported by my associate consists in the omission of these words: "*upon making just compensation therefor,*" which are used by my associate in defining the power of eminent domain. The law maker, no less than the mathematician, should observe the utmost accuracy in his definitions. Unless this be done, a confusion of ideas may be the result. Compensation is not an ingredient of eminent domain, and therefore cannot be referred to for the purpose of defining it. Instead of being an ingredient of the power, it is a *restriction* put upon its exercise by the constitution. Had it been an ingredient of the power there would have been no occasion to provide for it in the constitution.

SEC. 1238. Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses: Purposes for which it may be exercised.

1. Fortifications, magazines, arsenals, navy yards, navy and army stations, light-houses, range and beacon lights, coast surveys, and all other public uses authorized by the government of the United States.

Statutes of 1859, p. 26; 1852, p. 147; *People vs. Folsom*, 5 Cal. 373; *Gilmer vs. Lime Point*, 18 Cal. 229.

2. Public buildings and grounds for the use of the state, and all other public uses authorized by the legislature of this state.

Koppikus vs. State Capitol Commissioners, 16 Cal. 248; *State Prison Directors vs. George A. Worn et al.* 27 Cal. 171.

3. Public buildings and grounds for the use of any county, incorporated city or city and county, village or town; canals, aqueducts, flumes, ditches or pipes for conducting water for the use of the inhabitants of any county, incorporated city or city and county, village or town, or for draining any county, incorporated city or city and county, village or town; raising the banks of streams, removing obstructions therefrom, and widening, deepening or straightening their channels; roads, streets and alleys, and all other public uses for the benefit of any county, incorporated city or city and county, village or town, or the inhabitants thereof, which may be author-

Purposes for which it may be exercised.

ized by the legislature; but the mode of apportioning and collecting the costs of such improvements shall be such as may be provided in the statutes by which the same may be authorized.

Statutes of 1850, p. 87; 1856, p. 198; 1870, p. 763; 1868, p. 507; *Sherman vs. Buick et al.* 32 Cal. 241; *Creighton vs. Manson*, 27 Cal. 613; *Emery vs. San Francisco Gas Co.* 28 Cal. 345; *Emery vs. Bradford*, 29 Cal. 75.

4. Wharves, ferries, bridges, toll roads, by-roads, plank and turnpike roads, steam and horse railroads; canals, ditches, flumes, aqueducts and pipes, for public transportation, supplying mines and farming neighborhoods with water, and draining and reclaiming swamp and overflowed lands.

Statutes of 1864, p. 192; 1853, p. 169; 1861, p. 619; 1853, p. 87; 1858, p. 218; 1862, p. 540; 1868, p. 507.

5. Roads, tunnels, ditches, flumes, pipes and dumping places for working mines; also, the occupation in common, by the proprietors of different mines, of any natural outlet for conducting the tailings and refuse matter from such mines, in all cases where such occupation in common is practicable.

6. By-roads leading from highways to residences and farms not accessible by such highways, subject to such restrictions and conditions as may be prescribed by law.

NOTE.—The substance of this section is the same as that of the corresponding section reported by my associate. Some changes have been made in words and modes of expression, but the principal difference will be found at the commencement of the section. The section reported by my associate proceeds upon the theory, or rather implies, that the power of eminent domain may be exercised in behalf of particular corporations, individuals or persons. Such is not the case. It can be exercised only in behalf of the state, and the corporations, individuals and persons referred to are only the agents by which the state acts in exercising the power. Such being the theory upon which the power acts, it is obvious that the language of the statute should be consistent with it, in order that the true nature of the power with which we are dealing may be kept prominently before us. The seventh subdivision of the section, as reported by my associate, is entirely omitted, for the reason that it is considered wholly unnecessary and immaterial.

What estates in land may be acquired by condemnation.

SEC. 1239. The rights, titles and interests which may be acquired in lands, under the right of eminent domain, are as follows:

1. A fee simple, when taken for public buildings or grounds, or for permanent buildings to be used in connection with a right of way.

2. An easement, when taken for a highway, by-road, toll road, railroad, bridge, ferry or other public right of way. The term of the easement may be limited by the law establishing it, or it may be perpetual, and in either case it may be determined by abandonment. The land shall be used only for the purposes for which it shall have been taken, and when abandoned for such purposes the easement shall revert to the owners of the fee.

3. Right of entry upon and occupation of lands, with the right to take therefrom such earth, gravel, stones, trees and timber as may be needed for some public use:

NOTE.—With the exception of the first paragraph, this section is substantially the same as the corresponding section reported by my associate. As it seems to me, the first clause of his section does not express his true meaning. All private property, and every interest, estate and right therein, is subject to the right of eminent domain, and I do not understand him as intending to controvert that proposition, yet when he says that certain “interests, estates and rights in lands are subject to eminent domain,” he implies that all other interests, estates and rights are not. Besides this incongruity, the object of the section, as shown by the succeeding provisions, is not to declare what property is subject to the right of eminent domain, but to declare in what cases the entire estate in the land may be taken, and in what cases a lesser estate only shall be taken, making, as should be the case, the necessities of the use for which the land is taken the measure of the estate or interest to be taken; taking the whole where the use requires the whole, and a lesser estate where the lesser estate satisfies all the demands of the use. Such being the object of the section, all its provisions should be in harmony with it.

Since the preceding section and note has been submitted to my associate he has modified the language of the section to which the note refers. Before modification, the first paragraph of section 1239, as reported by my associate, read as follows:

“The following interests, estates and rights in land are subject to eminent domain:”

SEC. 1240. Private property, as used in this title, includes—

Private property defined.

1. All property, real or personal, corporeal or incorporeal, belonging to any person, association or corporation.

Classes enumerated.

2. Lands belonging to the government of the United

States or of this state, or to any county, incorporated city or city and county, village or town, not appropriated to some public use.

3. Property appropriated to public use; but such property shall not be taken unless for a more necessary public use than that to which it has been already appropriated.

4. Franchises for toll roads, toll bridges and ferries, and all other franchises, and the rights and property belonging thereto; but such franchises, rights and property shall not be taken unless for free highways, railroads or other more necessary public use.

5. All rights of way for any and all the purposes mentioned in section twelve hundred and thirty-eight, and any and all structures and improvements thereon, and the lands held or used in connection therewith, shall be subject to be connected with, crossed or intersected by any other right of way or improvements or structures thereon. They shall also be subject to a limited use, in common with the owner thereof, when necessary; but such uses, crossings, intersections and connections shall be made in manner most compatible with the greatest public benefit and least private injury.

6. All classes of private property not enumerated may be taken for public use, when such taking is authorized by law.

NOTE.—This section is substantially the same as the corresponding section reported by my associate. Some modifications have been made in the language.

Facts necessary to be found by court before condemnation.

SEC. 1241. In no case can private property be taken, under this title, unless it appears—

1. That the use to which it is to be applied has been authorized by some act of the legislature.

2. That the taking is necessary to such use.

3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use.

4. If the taking is not for the benefit of a political or municipal corporation, then, in respect to each parcel, that it cannot be obtained by purchase, or that it cannot be so obtained without the payment of a price deemed to be unreasonable; or that the owner or owners have no legal capacity to convey; or that the title is in controversy between adverse claimants.

NOTE.—The corresponding section reported by my associate is as follows :

“Sec. 1241. In no case shall private property be taken under this title, until the court shall find—

“1. That the use for which it is required is a public use.

“2. * * * * *

“3. That the public welfare requires such taking.

“4. * * * * *

It purports to confer upon the courts power not only to determine what is a public use, but also the power to determine whether the public welfare requires the taking. I cannot assent to incorporating either provision in the code. If the legislature is clothed with the power to determine what is a public use, it cannot delegate or transfer that power to the judiciary ; if, on the other hand, it is the province of the legislature to determine in the first instance what is a public use, and this determination is subject to review by the judiciary, the power of the latter is not derived from the statute, but from the fundamental law. In other words, the conclusion at which I have arrived is that it is not competent for the legislature to declare either that the courts shall or shall not determine whether a given use is a public one or not, and that the code ought not to contain any declaration upon the subject ; for in no event could such declaration affect the exercise of the power, rest where it may.

We all agree that a section such as 1238 is right and proper. It declares that certain uses are public uses, and the whole title ought to be in harmony with that declaration ; but such will not be the case if the views embodied in the title reported by my associate prevail. For in that event we would, in effect, have a declaration that certain uses are public ones and that private property may be taken for such uses (section 1238), followed by a declaration that private property cannot be taken for any such uses, unless the court finds that the uses are public ones (section 1241), declarations which in one breath assume that the power to declare what are public uses rests in the legislature, and in the next, that the power is lodged with the judiciary. It seems to me that the plain and straightforward way is for the legislature to declare, as we would have it do by section 1238, that certain uses are public ones, and there, assuming that it is right, let the matter rest ; then if the courts hold that the question as to what is a public use is a judicial one, it may always be raised upon an objection taken to the constitutionality of section 1238. The power to determine in a given instance whether the public welfare requires private property to be taken for a public use, my associate would vest in the courts (subd. 3). That this power is purely a political one, vested upon the soundest considerations of public policy in the law-making department, has never to my knowledge, until now, been doubted. With due deference to the opinion of my associate, I am nevertheless com-

pelled to believe that the enactment of the third subdivision would be a plain and palpable violation of the constitution. But be this as it may, the same reasons urged against the first subdivision are sufficient, in my judgment, to render the adoption of either subdivision inexpedient.

The following authorities bear upon the question involved: 13 Cal. 350; 30 id. 438; 32 id. 253; 36 id. 601; 38 id. 707; 4 Pick. 460; 7 id. 453; 23 id. 394; 7 Maine, 229; 3 Paige, 73; 4 Hill, 151; 2 Dallas, 312; 2 Blatchford, 95.

Upon this topic, says Mr. Sedgwick, in his work upon statutory and constitutional law, page 513: "As the power to take is universal, so it is absolute—that is to say, the *legislature are the sole judges* of the existence of the exigency which demands the sacrifice of the rights of individuals." And again, upon page 514: "We have also stated that the power to take private property applies to all property, and that the legislature is the *sole judge* as to the fact whether the public welfare demands the sacrifice of the private right."

"I admit," says Chancellor Walworth, in *Varrick vs. Smith* (5 Paige, 160), "that the legislature are the sole judges as to the expediency of exercising the right of eminent domain, for the purpose of making public improvements for the benefit of the inhabitants of the state generally, or of any particular section thereof."

"It is the *undoubted and exclusive* province of the legislature," says the supreme court of Maine, in *Spring vs. Russell* (7 Greenl. 292), "to decide when the public exigencies require that private property be taken for public uses."

In *Varaigne vs. Fox* (2 Blatchford, 95), the circuit court of the United States held "that in the exercise of the power of eminent domain, the legislature are the *exclusive judges* of the degree and quality of interest which are proper to be taken from an individual and dedicate to the public use, *as well as of the necessity of taking it.*"

In *Railroad Company vs. Davis* (2 Dev. & Bat. 467), the supreme court of North Carolina held that "it is for the legislature to judge, * * * whether in fact the public good requires the property, and to what extent."

See, also, authorities cited in *Gilmer vs. Lime Point* (18 Cal. 229).

Since the above was written, my associate has modified the section reported by him and omitted from it the third subdivision as quoted above, removing one cause of difference.

Parties may
make loca-
tion

May enter
to make
surveys.

SEC. 1242. In all cases where land is required for public use, the state, or its agents in charge of such use, may survey and locate the same; but it must be located in the manner which will be most compatible with the greatest public good and the least private injury, and subject to the provisions of section twelve hundred and forty-six. The state, or its agents in charge of such public use, may

enter upon the land and make examinations, surveys and maps thereof, and such entry shall constitute no cause of action in favor of the owners of the land, except for injuries resulting from negligence, wantonness or malice.

SEC. 1243. All proceedings under this title must be brought in the district court for the county in which the property is situated. They must be commenced by filing a complaint in the clerk's office, which must contain—

Jurisdiction
in district
court.

1. The name of the corporation, association, commission or person, in charge of the public use for which the property is sought, who must be styled plaintiffs.

Complaint,
its contents
and verifica-
tion.

2. The names of all owners and claimants of the property, if known, or a statement that they are unknown, who must be styled defendants.

3. A statement of the right of the plaintiff and of the performance of all precedent acts and conditions required by law.

4. If a right of way be sought, the complaint must show the location, general route and termini, and must be accompanied with surveys and maps thereof.

5. A description of each piece of land sought to be taken, and whether the same includes the whole or only a part of an entire parcel or tract.

All parcels lying in the county, and required for the same public use, may be included in the same or separate proceedings, at the option of the plaintiff, but the court may consolidate or separate them, to suit the convenience of parties. The complaint must be verified as in civil actions.

SEC. 1244. The clerk must issue a summons, which must contain the names of the parties, a general description of the whole property, a statement of the public use for which it is sought, and a reference to the complaint for descriptions of the respective parcels, and a notice to the defendants to appear and show cause why the property described should not be condemned as prayed for in the complaint. In all other particulars it must be in the form of a summons in civil actions, and must be served in like manner.

Summons,
what to
contain.

How issued
and served.

SEC. 1245. All persons in occupation of, or having or claiming an interest in, any of the property described in

Who may
defend.

What the answer may show, and how verified.

the complaint, or in the damages for the taking thereof, though not named, may appear, answer and defend, each in respect to his own property or interest, or that claimed by him, in like manner as if named in the complaint. Answers must be verified in like manner as the complaint.

Court shall have jurisdiction to regulate the mode of making crossings or of enjoying a common use.

SEC. 1246. The court shall have power—

1. To regulate and determine the place and manner of making connections and crossings, or of enjoying the common use mentioned in the fifth clause of section twelve hundred and forty.

2. To hear and determine all adverse or conflicting claims to the property sought to be condemned, and to the damages therefor.

3. To determine the respective rights of different parties seeking condemnation of the same property.

NOTE.—The second subdivision of the corresponding section reported by my associate, is omitted from this. In my judgment it not only imposes an unnecessary and troublesome duty upon the court, but one which the court is much less qualified to discharge than the parties in charge of the use, who must be presumed to be better advised as to what the use will require than anybody else, and especially the court. In view of the fact that such parties are required to pay for what they take or injure, there is no reason to apprehend that they will be disposed to cause unnecessary private injury. Their pecuniary interest will prove a better safeguard against such injuries than the judgment of a court which has had no experience in such matters.

Court or jury to assess damages.

SEC. 1247. The court or jury must hear such legal testimony as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess—

1. The value of the property sought to be condemned, and of each and every separate estate or interest therein. If it consists of different parcels, each parcel and each estate or interest therein shall be separately assessed.

2. If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff.

3. Separately, how much the portion not sought to be condemned, and each estate or interest therein, will be benefited, if at all, by the construction of the improve-

ment proposed by the plaintiff; and if the benefit shall be equal to the damages assessed, the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if the benefit shall be less than the damages, the former shall be deducted from the latter, and the remainder shall be the only damages allowed.

4. If the property sought to be condemned be for a railroad, the court or jury, in assessing damages, must include the cost of good and sufficient fences along the line of such railroad, and the cost of cattle guards where fences may cross the line of such railroad, unless plaintiff shall have offered or agreed in the complaint to construct the same; in which case the cost thereof shall not be included in the damages. If the land be uninclosed, the plaintiff shall not be required to construct fences and cattle guards until the owner of the land shall have constructed fences abutting upon such railroad.

5. As far as practicable, compensation must be assessed for each source of damage separately.

SEC. 1248. For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the summons, and its market value, at that date, shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken but injuriously affected, in all cases where such damages are allowed as provided in section twelve hundred and forty-seven. If an order be made letting the plaintiff into possession, as provided in section twelve hundred and fifty-two, the compensation and damages awarded shall draw lawful interest from the date of such order. No improvements put upon the property, subsequent to the date of the summons, shall be included in the assessment of compensation or damages.

The date with respect to which compensation shall be assessed, and the measure thereof.

SEC. 1249. If the title attempted to be acquired is found to be defective from any cause, the plaintiff may again institute proceedings to acquire the same, as in this title prescribed.

New proceedings to cure defective title.

SEC. 1250. The plaintiff must, within thirty days after final judgment, pay the sum of money assessed. Payment may be made to the defendants, or the money may

Payment of damages.

be deposited in court for the defendants, and be distributed to those entitled thereto. If the money be not so paid or deposited, the defendants may have execution as in civil cases, and if the money cannot be made on execution, the court, upon a showing to that effect, must set aside and annul the entire proceedings and restore possession of the property to the defendant, if possession has been taken by the plaintiff.

Final order
of condem-
nation, what
to contain.

When filed,
title vests.

SEC. 1251. When payments have been made, as required by the preceding section, the court must make a final order of condemnation, which must describe the property condemned and the purposes of such condemnation. A copy of the order must be filed in the office of the recorder of the county, and thereupon the property described therein shall vest in the plaintiff for the purposes therein specified.

Putting
plaintiff in
possession.

SEC. 1252. At any stage of the proceedings, the court may authorize the plaintiff, if already in possession, to continue therein; and if not, then to take possession of and use the property during the pendency and until the final conclusion of such proceedings, and may stay all actions and proceedings against the plaintiff on account thereof; but the plaintiff must give security, to be approved by such court or judge, to pay, as well the compensation in that behalf when ascertained, as all damages which may be sustained by the defendant, if for any cause the property shall not be finally taken for public use.

NOTE.—The corresponding section in the draft prepared by my associate, provides for a preliminary assessment of damages, and that the amount thereof shall be deposited in court before the entry can be made; in other words, substitutes a deposit of money for the bond. Were the plan of my associate adopted, the moving party would, upon the deposit of the money, be released from all liability, and the defendant would be compelled, at last, to rely for his security solely upon the official bond of the clerk—upon a bond with which he had nothing to do. Under the section submitted by myself, the defendant is secured—

1. By the responsibility of the moving party;
2. By a bond on which the sureties may be subject to an examination at his instance; and,
3. By the fact that if the money is not paid, no judgment of final condemnation can be entered.

To adopt the section proposed by my associate, would be

to deprive the defendant of any adequate security, whilst at the same time it would open wide the door of oppression upon the moving party. Take, for instance, the notorious case of the Vallejo R. R. Co. vs. C. P. R. R. Co., now pending in the courts. Suppose that instead of a bond, as a condition precedent to taking temporary possession of the land of the latter company, the former one had been compelled to submit to a preliminary assessment of damages, what would have been the result? The Vallejo company would have been compelled to have deposited about \$400,000 in court, to have remained until a final determination of the proceedings, and if not able to do this, it would have entirely failed in running its road into this city. I cannot give my consent to a proposition, the virtual effect of which would be to retard the operation of weaker corporations when they came into contact with stronger ones—a proposition that substitutes the official bond of the clerk for the better security that the owner of the property has under the draft submitted by myself.

Sec. 1253. Except as is otherwise provided in this title, the provisions of part two of this code are applicable to and constitute the rules of practice in these proceedings.

Rules of
practice.

NOTE.—The object of this section is to give a trial by jury in every case, if demanded, and when not demanded, a trial by the court; and to conform the practice in these proceedings as near as practicable to that in civil actions. The advantage in having the practice in different proceedings in the courts as nearly uniform as possible is so manifest that arguments in favor of it would be useless.

OPINION OF COMMISSIONER BURCH,

CONCURRING WITH COMMISSIONER LINDLEY ON EMINENT DOMAIN.

Having carefully examined and assisted in perfecting the title on "Eminent Domain" prepared by my associate, Judge Lindley, I shall give briefly the reasons which impel me to agree with him rather than with Mr. Haymond, on their main question of difference—the branch of government which, under our system, determines what is a "public use," within the meaning of the eighth section of article 1 of the state constitution. With regard to the methods proposed for the assessment and payment of damages, we do not materially differ; but, as a whole, I prefer that of Judge Lindley.

The section above referred to, of our constitution, is virtually the same in nearly every state constitution in the union, and has been long since construed. In fact, so soon as our courts obtained a confidence in their power to pass upon the constitutionality of laws, I regard the lodgment of the power to pass upon the constitutionality of statutes declaring it "*expedient*" to take private prop-

erty for "public use" as conceded to the courts of the state, and the ultimate power in the state supreme court. The third article of our state constitution makes a clear distribution of the powers of the co-ordinate departments of the state government, declaring that no one body shall exercise any of the functions of two of these departments. Those of the legislature and the courts have been the subject of much research and are kept distinct.

The legislature declares it "expedient" to take private property for certain "public uses," naming them. It is nowhere claimed that the courts can pass upon or review this action, nor can they inquire whether a legislative act is or is not "expedient," but they have always had, and have frequently exercised, the power of determining the question whether the use for which *private property* was authorized to be taken was a "public" or a "private use," and if the latter, to declare the law unconstitutional. Scarcely a supreme court exists which has not, in some of its decisions, made the declaration that it is unconstitutional to "take the private property of one citizen and transfer it to another," or to "take the property of A and give it to B." (3 Paige, 73; N. Y. Ch. R. —; 2 Kent, 416-18; Cooley's Const. Lim. 530-1, *et seq.*, and cases there cited.) In the case of a dam across the Merrimac river, etc., cited on page 535, Cooley's C. L. above, Shaw C. J. says, speaking of the import of the words "public use": "In determining it we must look to the declared purposes of the act, and if a public use is declared, it will be so held, *unless it manifestly appears by the provisions of the act they can have no tendency to advance and promote such public use.*" These cases and authorities, in addition to those cited by Judge Lindley, strongly support the right and power of the courts to inquire into the fact whether the use for which private property is sought to be taken is a "public use" or not, and if not, to declare the legislation nugatory or invalid, as being unauthorized by the constitution. In the case of the West River Bridge Co. vs. Dix et al. (6 Howard U. S. S. Court, pp. 520-1) Messrs. Webster and Collamer in their brief hold this language:

"This power—the eminent domain—which only within a few years was first recognized and naturalized in this country, is unknown to our constitution or that of the states. It has been adopted from writers from other and arbitrary governments, and goes on the ground that all the powers heretofore regarded as incidents of sovereignty must be existing in some department of state authority, which is far from true. But being now recognized in court, our *only security is to be found in this tribunal*, to keep it within some safe and well defined limits, or our state governments will be but unlimited despotisms over the private citizens. They will soon resolve themselves into the existing will of the existing majority as to what shall be taken and what shall be left to any obnoxious, natural or artificial person. It is easy to see that, by a very slight improvement on the proceedings in this case, and in pursuance of the avowed principle, that as to the exercise of this power of eminent domain, if the legislature or their agents are to be the sole judges of what is to be taken, and to what public use it is to be appropriated, the most levelling ultraisms of anti-rentism, or agrarianism, or abolitionism, may be successfully advanced."

This language was employed in a case where the question was one of power to impair the obligation of a legislative contract by a subsequent act authorizing a previously chartered bridge to be taken for a more extended "public use." The question of whether the use was a "public use" was not particularly involved; nor could it have been in the United States supreme court; but in deference to the very able brief of Mr. Webster, Justice Levi Woodbury, in his opinion concurring, uses the following language (6 Howard U. S. Sup. Court Rep. 548):

"And though I agree that for most cases and purposes the public authorities in a state are the suitable judges as to this point, and that the *judiciary only decide if their laws are constitutional* (2 Kent. 340; 1 Rice, 383); that the legislature generally acts for the public in this; that road agents are their agents under this limitation; yet I am not prepared to agree that *if on the face*

of the whole proceedings—the law, the report of commissioners and the doings of the court—it is manifest that the object was not legitimate, or that illegal intentions were covered up in forms, or the whole proceedings a mere ‘pretext,’ our duty would require us to uphold them.”

From this it manifestly appears that Judge Woodbury, in any proper case presented to him, would, unhesitatingly, have considered and passed upon the question whether the use was or was not a *public use*, even though it was declared a public use by the legislature.

It appears to me that a careful examination of this question will convince the most skeptical that the opponents of the theory that our courts have a supervisory power over the legislative declaration that a “use” is a “public use,” are drawn to this conclusion because our courts have so frequently *declared and reiterated* the fact that *they have not* and will never undertake to decide upon the “*expediency*” of legislation; and this conclusion is the natural result of confounding this declaration with a denial of power to pass upon the constitutional limitation. By reference to the note of commissioner Haymond to his section 1241 ante, and the authorities there cited, it will appear that the above view is fully sustained; the words “*expediency*,” “*exigency*” and “*necessity*,” are of the same import.

Under our constitutional provision there are three requisites recognized, one of power, and two of limitation used negatively with regard to private property: 1. Power to take it; 2. The purpose for which it may be taken; and 3. Remuneration. In the original or first adoption of this constitutional provision, it was intended to be a limitation upon governmental power over private property, rather than a recognition and adoption of the English “*eminent domain*,” which existed in the ownership of the entire domain by the king, with a reserved power to resume it from his *feofment*. Our constitutional provision is upon an entirely different theory, for it simply negatively defines the state’s right to take private property, even a fee vested in the citizen or any lesser estate or property, with two limitations or conditions: it must be for a public use, and on compensation being made. It cannot therefore be said to be an adoption of the “*eminent domain*,” in the English acceptation of the term, which is used to “take private property for public use” without any condition or limitation whatever.

A true construction of this constitutional provision has been very frequently given in decisions by our courts, and by writers. Sedgwick, in his *Const. and Stat. Law*, p. 179 *et seq.*, and particularly in chapter 10, p. 475, discusses the power of courts over legislation, embracing the constitutionality of all laws fully and fairly. On p. 478 he says:

“The subject was early considered in a case in Pennsylvania, and Mr. Justice Patterson asserted the power of the judiciary in very distinct and emphatic terms. He said: ‘It is an important principle which, in the discussion of questions of the present kind, ought never to be lost sight of—that the judiciary of this country is not a subordinate but co-ordinate branch of the government; and, whatever may be the case in other countries, yet in this there can be no doubt that every act of the legislature *repugnant* to the constitution is *absolutely void*.’”

Mr. Sedgwick treats of the subject of constitutional checks and limitations on legislative power in this country with great clearness, and ranks two of them as of paramount importance. “One guaranteeing the inviolability of private property,” and the other “protecting the obligation of contracts.” Has it ever been questioned that an act of the legislature, obnoxious to the constitutional provision “that no law impairing the obligation of contracts shall ever be passed,” could be reviewed by the courts? Has it ever been doubted that if a legislative enactment declared it to be “*due process of law*”

that, by order of the executive, A or B or any class of persons should be hung or incarcerated, or surrender certain of their property, that the courts have power to inquire into and determine whether or not proceedings executing such a legislative will would be had under "due process of law?" I apprehend no one has, or ever had, the temerity to question this power of the court; then why question their power to inquire whether the "use" which the legislature declares to be a "public use" is in fact such use or not. The reason of the rule fails if it is not equally applicable to both cases. The same argument may be applied to all the rights guaranteed in article 1 of our constitution, for with equal propriety it might be claimed that the power of the legislature over them is absolute and not subject to review by the courts. Courts daily protect those rights from attempted invasion under color of statute law. Why is this an exception? Because it is said to be an attribute of sovereignty? Because it is "eminent domain?" This constitutional limitation has, by common consent, long usage and acquiescence, been clothed in the garb and recognized in our courts as the positive power or right of "eminent domain," but its inception was a limitation upon the power erroneously supposed to exist in some one department of state authority, which is far from true.

Mr. Sedgwick, on page 514 of his work above quoted, says of the taking of private property :

"It seems to be the sounder construction that the declaration that private property shall not be taken for public use without compensation impliedly prohibits private property being taken for *private use* at all. So, in New York, the supreme court has said. (11 Wend. 151.)

"The constitution, by authorizing the appropriation of private property to *public use*, impliedly declares that for *any other use*, private property shall not be taken from one and applied to the private use of another."

The same is declared by Mr. Senator Tracy, of the court of errors.

Were not these courts passing then on the very question which we say our courts have the power to decide? When the courts say that "an appropriation of private property to private purposes is a mere abuse of power" (Sedgwick, 515), are they not deciding the very question involved here? These expressions are idle, unless we are to understand from them judicial protection of private property from legislative invasion. We all know and feel the propriety of this view of our constitution, and the recognition somewhere of a responsibility paramount to any which has ever yet attached to the mere legislator. Seated in, and acting with, a large body, the responsibility resting on the individual is very light compared with that of a court, or members thereof, where three often divide the most weighty responsibility. Besides, in our view of the constitution, two checks in the place of one is interposed to protect private property from the predatory incursions of the unscrupulous.

The admirable summing up of this subject, on pages 533-4, by Mr. Sedgwick, is, to my mind, unanswerably in favor of my view of this question, and emphatically declares his conclusions to be "substantially the form that the constitutional provision" (that in question) "has assumed in the hands of the courts;" "that our constitutional guarantees are very flexible things, and that the judicial power exerts an influence in our system which makes the subject of *interpretation* one of the first magnitude." No intelligent person can mistake what is meant by this language, "assumed in the hands of the courts." It means that the question *has been* and *is to be handled*—that is, decided—by the courts.

It would appear unnecessary to refer to other authorities or argue this question further, but the case of Talbot and another vs. Hudson and others (16 Gray, Mass. Reports, 421) rendered in 1860, is so positive, pertinent and con-

clusive, that I quote briefly from the argument or reasoning of Bigelow, C. J., as follows :

“In considering this objection, we are met in the outset with the suggestion that it is the exclusive province of the legislature to determine whether the purpose or object for which property is taken is a public use, and that it is not within the province of the judicial department of the government to revise or control the will or judgment of the legislature upon the subject, when expressed in the form of a legal enactment. But this position seems to us to be obviously untenable. The provision in the constitution, that no part of the property of an individual can be taken from him or applied to public uses without his consent or that of the legislature, and that when it is appropriated to public uses he shall receive a reasonable compensation therefor, necessarily implies that it can be taken only for such a use, and is equivalent to a declaration that it cannot be taken and appropriated to a purpose in its nature private, or for the benefit of a few individuals. In this view, it is a direct and positive limitation upon the exercise of legislative power, and any act which goes beyond this limitation must be unconstitutional and void. No one can doubt that if the legislature should by statute take the property of A and transfer it to B, it would transcend its constitutional power. In all cases, therefore, where this power is exercised, it necessarily involves an inquiry into the rightful authority of the legislature under the organic law. But the legislature have no power to determine finally upon the extent of their authority over private rights. That is a power in its nature essentially judicial, which they are by article 30 of the declaration of rights expressly forbidden to exercise. The question whether a statute in a particular instance exceeds the just limits prescribed by the constitution must be determined by the judiciary. In no other way can the rights of the citizen be protected, when they are invaded by legislative acts which go beyond the limitations imposed by the constitution.”

The opinion proceeds to discuss the particular case much further with great clearness, but I deem this sufficient for our use.

What can be more conclusive than this? The reasoning is clear and cogent. I cannot permit myself to suppose that our supreme court has, in any instance, confounded the giving of the legislative consent to the taking of private property, or a legislative declaration that an exigency exists for taking private property for “public use,” is synonymous or co-extensive with that absolutism claimed for the legislative branch to declare in all cases what are “public uses,” without regard to truth.

A blind acquiescence of our judges, to whom alone are entrusted the powers of preserving the guarantees of the constitution and protecting the rights of citizens from legislative invasion, in a total disregard of our “*bill of rights*,” is not, with me, a supposable case.

For these reasons, I concur with Judge Lindley in retaining the second subdivision of section 1241 of his work on “Eminent Domain,” and urge the adoption thereof by the legislature.

JOHN C. BURCH,
Commissioner.

NOTE BY COMMISSIONER LINDLEY.

Eminent domain goes to press with incorporated amendments of commissioner Burch, and an alternate title by commissioner Haymond. I have not been able to give the desirable consideration to the subject since their discussion and proposed amendments. Upon cursory examination, I see no objections to the several amendments proposed by commissioner Burch, and therefore concur. I do not approve of the printing, in the middle of this volume, separate plans, reports and notes, by the respective commissioners, but I cannot, by vote, refuse to permit a co-commissioner to write and print what he

deems proper about any law prepared by me, upon which we fail to agree. This subject—this controversy—should have been postponed for further consideration and submitted to the legislature by itself as a single measure. Should I deem it useful, I will give a brief history of the title and the results of my consideration of the subject (amendments and dissenting chapter), in an appendix to this volume, or in a report to the legislature, or in some other proper mode.

CHAS. LINDLEY,
Commissioner.

TITLE VIII.

OF ESCHEATED ESTATES.

SECTION 1269. Manner of commencing proceedings relative to escheated estates.

1270. Receiver of rents and profits may be appointed. •

1271. Appearance, pleadings and trial.

1272. Proceedings by persons claiming escheated estates.

Manner of
commencing
proceedings
relative to
escheated
estates.

SEC. 1269. When the attorney-general is informed that any real estate has escheated to this state, he must file an information in behalf of the state, in the district court of the judicial district in which such estate, or any part thereof, is situated, setting forth a description of the estate, the name of the person last seized, the name of the occupant and person claiming such estate, if known, and the facts and circumstances in consequence of which the estate is claimed to have escheated, with an allegation that, by reason thereof, the state of California has right by law to such estate. Upon such information, a summons must issue to such person, requiring him to appear and answer the information within the time allowed by law in civil actions; and the court must make an order, setting forth briefly the contents of the information, and requiring all persons interested in the estate to appear and show cause, if any they have, within forty days from the date of the order, why the same should not vest in this state; which order must be published at least one month from the date thereof, in a newspaper published in the district, if one be published therein, and in case no newspaper is published in the district, in some other newspaper in this state. •

Statutes of 1852, p. 103.

Sec. 1270. The court, upon the information being filed and upon the application of the attorney-general, either before or after answer, upon notice to the party claiming such estate, if known, may, upon sufficient cause therefor being shown, appoint a receiver to take charge and receive the rents and profits of the same until the title to such real estate is finally settled.

Receiver of
rents and
profits may
be appointed

Statutes of 1856, p. 222.

Sec. 1271. All persons named in the information may appear and answer, and may traverse or deny the facts stated in the information, the title of the state to lands and tenements therein mentioned, at any time before the time for answering expires; and any other person claiming an interest in such estate may appear and be made a defendant, and by motion for that purpose, in open court, within the time allowed for answering; and if no person appears and answers within the time, then judgment must be rendered that the state be seized of the lands and tenements in such information claimed. But if any person appear and deny the title set up by the state, or traverse any material fact set forth in the information, the issue of fact must be tried as issues of fact are tried in civil actions. If, after the issues are tried, it appears from the facts found or admitted, that the state has good title to the land and tenements in the information mentioned, or any part thereof, judgment must be rendered that the state be seized thereof, and recover costs of suit against the defendants.

Appearance,
pleadings
and trial.

Statutes of 1852, p. 103.

Sec. 1272. Within twenty years after judgment in any proceeding had under this title, a person not a party or privy to such proceeding may file a petition in the district court of the county of Sacramento, showing his claim or right to the property or the proceeds thereof. A copy of such petition must be served on the attorney-general at least twenty days before the hearing of the petition, who must answer the same; and the court thereupon must try the issue as issues are tried in civil actions, and if it be determined that such person is entitled to the property or the proceeds thereof, it must order the property, if it has not been sold, to be delivered to him, or if it has been sold

Proceedings
by persons
claiming
escheated
estates.

and the proceeds paid into the state treasury, then it must order the controller to draw his warrant on the treasury for the payment of the same, but without interest or cost to the state, a copy of which order, under the seal of the court, shall be a sufficient voucher for drawing such warrant. All persons who fail to appear and file their petitions within the time limited, are forever barred, saving, however, to infants, married women and persons of unsound mind, or persons beyond the limits of the United States, the right to appear and file their petitions at any time within five years after their respective disabilities cease.

Statutes of 1870, p. 72.

TITLE IX.

OF CHANGE OF NAMES.

SECTION 1275. Jurisdiction.

1276. Application for change of name, how made.

1277. Publication of petition for.

1278. Hearing of application and remonstrance.

Jurisdiction. **SEC. 1275.** Applications for change of names must be heard and determined by the county courts.

Application for change of name, how made. **SEC. 1276.** All applications for change of names must be made to the county court of the county where the person whose name is proposed to be changed resides, by petition, signed by such person; and if such person is under twenty-one years of age, if a male, and under the age of eighteen years, if a female, by one of the parents, if living; or if both be dead, then by the guardian; and if there be no guardian, then by some near relative or friend. The petition must specify the place of birth and residence of such person, his or her present name, the name proposed and the reason for such change of name, and must, if the father of such person be not living, name, as far as known to the petitioner, the near relatives of such person and their place of residence.

Publication of petition for. **SEC. 1277.** A copy of such petition must be published for four successive weeks, in some newspaper printed in

the county, if a newspaper be printed therein, but if no newspaper be printed in the county, a copy of such petition must be posted at three of the most public places in the county for a like period, and proofs must be made of such publication before the petition can be considered.

Sec. 1278. Such application must be heard at such time during term as the court may appoint, and objections may be filed by any person who can in such objections show to the court good reason against such change of name. On the hearing the court may examine, upon oath, any of the petitioners, remonstrants or other persons, touching the application, and may make an order changing the name or dismissing the application, as to the court may seem right and proper.

Hearing of application and remonstrance.

TITLE X.

OF ARBITRATIONS.

SECTION 1281. What may be submitted to arbitration, and when.

1282. Submission to arbitration to be in writing.

1283. Submission may be entered as an order of the court. Revocation.

1284. Powers of arbitrators.

1285. Majority of arbitrators may determine any question. They must be sworn.

1286. Award to be in writing. When judgment to be entered.

1287. Award may be vacated in certain cases.

1288. Court may, on motion, modify or correct the award.

1289. Decision, on motion, subject to appeal, but not the judgment entered before motion.

1290. If submission be revoked and an action brought, what to be recovered.

Sec. 1281. (§ 380.) Persons capable of contracting may submit to arbitration any controversy which might be the subject of a civil action between them, except a question of title to real property in fee or for life. This qualification does not include questions relating merely to the partition of boundaries or real property.

What may be submitted to arbitration, and when.

Sec. 1282. (§ 381.) The submission to arbitration must be in writing, and may be to one or more persons.

Submission to arbitration to be in writing.

Submission
may be en-
tered as an
order of the
court.

SEC. 1283. (§ 382.) It may be stipulated in the submission, that it be entered as an order of the county court, or of the district court, for which purpose it must be filed with the clerk of the county where the parties, or one of them, reside. The clerk must thereupon enter in his register of actions a note of the submission, with the names of the parties, the names of the arbitrators, the date of the submission, when filed, and the time limited by the submission, if any, within which the award must be made. When so entered, the submission cannot be revoked without the consent of both parties. The arbitrators may be compelled by the court to make an award, and the award may be enforced by the court in the same manner as a judgment. If the submission is not made an order of the court, it may be revoked at any time before the award is made.

Revocation.

Powers of
arbitrators.

SEC. 1284. (§ 383.) Arbitrators have power to appoint a time and place for hearing, to adjourn from time to time, to administer oaths to witnesses, to hear the allegations and evidence of the parties and to make an award thereon.

Majority of
arbitrators
may deter-
mine any
question.
They must
be sworn.

SEC. 1285. (§ 384.) All the arbitrators must meet and act together during the investigation; but when met, a majority may determine any question. Before acting, they must be sworn before an officer authorized to administer oaths, faithfully and fairly to hear and examine the allegations and evidence of the parties in relation to the matters in controversy, and to make a just award according to their understanding.

Award to be
in writing.

When judg-
ment to be
entered.

SEC. 1286. (§ 385.) The award must be in writing, signed by the arbitrators, or a majority of them, and delivered to the parties. When the submission is made an order of the court, the award must be filed with the clerk, and a note thereof made in his register. After the expiration of five days from the filing of the award, upon the application of a party, and on filing an affidavit, showing that notice of filing the award has been served on the adverse party or his attorney, at least four days prior to such application, and that no order staying the entry of judgment has been served, the award must be entered by the clerk in the judgment book, and thereupon has the effect of a judgment.

SEC. 1287. (§ 386.) The court, on motion, may vacate the award upon either of the following grounds, and may order a new hearing before the same arbitrators, or not, in its discretion :

Award may
be vacated in
certain cases.

1. That it was procured by corruption or fraud.

2. That the arbitrators were guilty of misconduct, or committed gross error in refusing, on cause shown, to postpone the hearing, or in refusing to hear pertinent evidence, or otherwise acted improperly, in a manner by which the rights of the party were prejudiced.

3. That the arbitrators exceeded their powers in making their award; or that they refused, or improperly omitted, to consider a part of the matters submitted to them; or that the award is indefinite, or cannot be performed.

SEC. 1288. (§ 387.) The court may, on motion, modify or correct the award, where it appears—

Court may,
on motion,
modify or
correct the
award.

1. That there was a miscalculation in figures upon which it was made, or that there is a mistake in the description of some person or property therein.

2. When a part of the award is upon matters not submitted, which part can be separated from other parts, and does not affect the decision on the matters submitted.

3. When the award, though imperfect in form, could have been amended if it had been a verdict, or the imperfection disregarded.

SEC. 1289. (§ 388.) The decision upon the motion is subject to appeal in the same manner as an order which is subject to appeal in a civil action; but the judgment entered before a motion made cannot be subject to appeal.

Decision, on
motion, sub-
ject to appeal
but not the
judgment
entered be-
fore motion.

SEC. 1290. (§ 389.) If a submission to arbitration be revoked, and an action be brought therefor, the amount to be recovered can only be the costs and damages sustained in preparing for and attending the arbitration.

If submission
be revoked
and an action
brought,
what to be
recovered.

TITLE XI.

OF PROCEEDINGS IN PROBATE COURTS.

CHAPTER I. *Of jurisdiction.*

- II. *Of the probate of wills.*
- III. *Of executors and administrators, their letters, bonds, removals and suspensions.*
- IV. *Of the inventory and collection of the effects of decedents.*
- V. *Of the provisions for support of family, and of the homestead.*
- VI. *Of claims against the estate.*
- VII. *Of sales and conveyance of property to decedents.*
- VIII. *Of the powers and duties of executors and administrators, and of the management of estates.*
- IX. *Of the conveyance of real estate by executors and administrators in certain cases.*
- X. *Of accounts rendered by executors and administrators, and of the payment of debts.*
- XI. *Of the partition, distribution and final settlement of estates.*
- XII. *Of orders, decrees, process, minutes, records and appeals.*
- XIII. *Of public administrator.*
- XIV. *Of guardian and ward.*

CHAPTER I.

OF JURISDICTION.

- SECTION 1294. Jurisdiction of probate court over the estate, when exercised.
 1295. When jurisdiction decided by first application.

Jurisdiction
of probate
court over
the estate,
when exer-
cised.

SEC. 1294. (§ 2.) Wills must be proved, and letters testamentary or of administration granted—

1. In the county of which the decedent was a resident at the time of his death, in whatever place he may have died.

2. In the county in which the decedent may have died, leaving estate therein, he not being a resident of the state.

3. In the county in which any part of the estate may be, the decedent having died out of the state and not a resident thereof at the time of his death.

4. In the county in which any part of the estate may be, the decedent not being a resident of the state and not leaving estate in the county in which he died.

5. In all other cases, in the county where application for letters shall first be made.

Statutes of 1851, p. 448, § 2; 1861, p. 628.

NOTE.—The first subdivision has been made to conform to the decision in the cases of *Beckett vs. Selover* (7 Cal. 215); *Abel vs. Love* (17 Cal. 233).

SEC. 1295. (§ 3.) When the estate of the decedent is in more than one county, he having died out of the state, and not having been a resident thereof at the time of his death, or being such non-resident and dying within the state and not leaving estate in the county where he died, the probate court of that county in which application is first made for letters testamentary or of administration, has exclusive jurisdiction of the settlement of the estate.

When jurisdiction decided by first application.

Statutes of 1851, p. 448, § 3; 1864, p. 367, § 2.

CHAPTER II.

OF THE PROBATE OF WILLS.

ARTICLE I. PETITION, NOTICE AND PROOF.

II. CONTESTING PROBATE OF WILL.

III. PROBATE OF FOREIGN WILLS.

IV. CONTESTING WILL AFTER PROBATE.

V. PROBATE OF LOST OR DESTROYED WILL.

VI. PROBATE OF NUNCUPATIVE WILLS.

ARTICLE I.

PETITION, NOTICE AND PROOF.

SECTION 1298. Custodian of will to deliver same, to whom. Penalty.

1299. Who may petition for probate of will.

1300. Contents of petition.

1301. When executor forfeits right to letters.

1302. Will to accompany petition, or its presentation prayed for and how enforced.

SECTION 1303. Notice of petition for probate, how given.

1304. Heirs and named executors to be notified, how.

1305. Petition may be presented to judge at chambers, and what judge may do.

1306. Hearing proof of will after proof of service of notice.

1307. Who may appear and contest the will.

1308. Probate, when no contest.

Custodian
of will to
deliver same,
to whom.

Penalty.

SEC. 1298. (§ 4.) Every custodian of a will, within thirty days after receipt of information that the maker thereof is dead, must deliver the same to the probate court having jurisdiction of the estate, or to the executor named therein. A failure to comply with the provisions of this section makes the person failing responsible for all damages sustained by any one injured thereby.

Statutes of 1851, p. 449, § 4.

Who may
petition for
probate of
will.

SEC. 1299. (§§ 5, 9.) Any executor, devisee or legatee named in any will, or any other person interested in the estate, may, at any time after the death of the testator, petition the court having jurisdiction to have the will proved, whether the same be in writing, in his possession or not, or is lost or destroyed, or beyond the jurisdiction of the state, or a nuncupative will.

N. Y. C. C. vol. 8, § 3, Ap. D, p. xxiii; Statutes of 1851, p. 449, §§ 5, 9.

Contents of
petition.

SEC. 1300. (§ 6.) A petition for the probate of a will must show—

1. The jurisdictional facts.
2. Whether the person named as executor consents to act, or renounces his right to letters testamentary.
3. The names, ages and residence of the heirs and devisees of the decedent.
4. The probable value and character of the property of the estate.
5. The name of the person for whom letters testamentary are prayed.

No defect of form or in the statement of jurisdictional facts actually existing shall make void the probate of a will.

Statutes of 1851, p. 449, § 6; 1861, p. 628, § 6.

When execu-
tor forfeits
right to
letters.
N. S.

SEC. 1301. (§ 5.) If the person named in a will as executor, for thirty days after he has knowledge of the death of the testator, and that he is named as executor,

fails to petition the proper court for the probate of the will and that letters testamentary be issued to him, he has renounced his right to letters, and the court may appoint any other competent person.

Statutes of 1851, p. 449, § 5.

Sec. 1302. (§§ 10, 11.) Every petition for the probate of a will must be accompanied with the will, or a præcipe for a *subpœna duces te cum* to be issued to the custodian thereof, or contain all information concerning the same in the possession of the petitioner, and ask and receive such order relative thereto as will enable the court to obtain possession of all the facts concerning the same; and the court by its order may compel the production of the will, the attendance of all requisite witnesses and enforce disclosures concerning the same. A failure by the custodian of, or witnesses to any will, to comply with the order of the court, subjects such person to imprisonment in the county jail until compliance therewith.

Will to accompany petition, or its presentation prayed for and how enforced.
N. S.

Statutes of 1851, p. 449, §§ 10, 11.

Sec. 1303. (§§ 13, 16.) When the petition is filed and the will produced, the probate judge must fix a day for hearing the petition, not less than ten nor more than thirty days from the production of the will. Notice of the hearing shall be given by the clerk of the court, by publishing the same in a newspaper of the county; if there be none, then by three written or printed notices posted at three of the most public places in the county. If the notice is published in a weekly newspaper, it must appear therein on at least three different days of publication, and if in a newspaper published oftener than once a week, it shall be so published that there must be at least ten days from the first to the last day of publication, both the first and the last day being included. If the notice is by posting, it must be given at least ten days before the hearing.

Notice of petition for probate, how given.
N. S.

Statutes of 1851, p. 449, §§ 13, 16; 1861, p. 629, § 5 amends § 13, 16; 1865-6, p. 765, § 1.

Sec. 1304. (§§ 14, 15.) The heirs of the testator, resident in the county or state, must have written or printed notice of the time fixed for the probate of the will, addressed to them and placed in the post-office by the peti-

Heirs and named executors to be notified, how

tioner, at the date of the first publication ; the notice must be issued by the clerk, over his official seal. Proof of mailing the notice must be made at the hearing ; the same notice and proof of service thereof on the person named as executor must be made, if he be not the petitioner ; also, on any person named as co-executor, not petitioning.

Statutes of 1851, p. 450, §§ 14, 15.

NOTE.—This omits actual personal service, as a matter of economy. Published notice mailed to each is sufficient.

Petition may be presented to judge at chambers, and what judge may do

SEC. 1305. (§ 12.) The probate judge may, out of term time or at chambers, receive petitions for the probate of wills, and make and issue all necessary orders and writs to enforce the production of wills and the attendance of witnesses, and may appoint special terms of his court for hearing the petitions, trials of issues, and admitting wills to probate.

Statutes of 1851, p. 448, § 12 ; 1861, p. 629, § 12.

Hearing proof of will after proof of service of notice.

SEC. 1306. (§ 17.) At the time appointed for, or to which the hearing may have been postponed, the court must require proof, by affidavit, that the notices hereinbefore required have been personally served or mailed and published, which being made, the court must hear testimony in proof of the will. If such notice is not proved to have been given, or if from any other cause it is necessary, the hearing may be postponed to a day certain, and notice to absentees given thereof, as original notice is required to be given. Parties interested being in court is a waiver of notice.

Statutes of 1861, p. 450, § 17 ; 1861, p. 629, § 7.

Who may appear and contest the will.

SEC. 1307. (§ 18.) Any person interested may appear and contest the will. Devisees, legatees, heirs or creditors of an estate may contest the will through their guardians, or attorneys appointed by themselves, or by the court, for that purpose ; but a contest made by an attorney appointed by the court does not bar a contest after probate, by the party so represented, if commenced within the time provided in article two of this chapter ; nor does the non-appointment of an attorney by the court of itself invalidate the probate of a will, unless the party complaining thereof is actually damaged thereby.

Statutes of 1851, p. 450, § 18 ; 1861, p. 630, § 8.

Sec. 1308. (§ 19.) If no person appears to contest the probate of a will, the court may admit it to probate on the testimony of one of the subscribing witnesses only, if he testifies that the will was executed in all particulars as required by law, and that the testator was of sound mind at the time of its execution.

Probate,
when no
contest.

Statutes of 1851, p. 450, § 19.

ARTICLE II.

CONTESTING PROBATE OF WILLS.

Section 1312. Contestant to file grounds of contest and petitioner to reply.

1313. How jury obtained and trial had.

1314. Verdict of the jury. Judgment. Appeal.

1315. Witnesses, who and how many to be examined. Proof of handwriting admitted, when.

1316. Testimony reduced to writing for future evidence.

1317. If proved, certificate to be attached.

1318. Will and proof to be filed and recorded.

Sec. 1312. (§ 20.) If any one appears to contest the will, he must file written grounds of opposition to the probate thereof, and serve a copy on the petitioner and other residents of the county interested in the estate, any one or more of whom may demur thereto upon any of the grounds of demurrer provided for in part two, title six, chapter three, of this code. If the demurrer is sustained, the court must allow the contestant a reasonable time, not exceeding ten days, within which to amend his written opposition. If the demurrer is overruled, the petitioner and others interested may jointly or separately answer the contestant's grounds, traversing or otherwise obviating or avoiding the objections. Any issues of fact thus raised, involving—

Contestant to
file grounds
of contest
and petition-
er to reply.
N. 8.

1. The competency of the decedent to make a last will and testament.

2. The execution of the will by the decedent under restraint, undue influence or fraudulent representations.

3. The due execution and attestation of the will by the decedent or subscribing witnesses; or,

4. Any other substantial grounds affecting the validity of the will—

Must, on request of either party in writing (filed three

days prior to the day set for the hearing), be tried by a jury. If no jury is demanded, the court must try and determine the issues joined. On the trial, the contestant is plaintiff and the petitioner is defendant.

Statutes of 1851, p. 450, § 20 ; 1861, p. 628, § 9 ; 1867-8, p. 628, § 1.

NOTE.—The only material change here made is in providing a more formal method of making up the issues of fact to be tried. We have not observed that in any other state the course here adopted is pursued ; but in view of the decision of the supreme court in the Broderick will case (*State vs. McGlynn*, 20 Cal. 233) and the great value of estates sometimes involved in the probate of wills, it is certainly wise and eminently proper that the issues should be carefully and pertinently made. We here make the contestant the plaintiff. Judge Currey, of the former commission, went as far as demurrer ; we have gone further, and require an answer.

How jury
obtained and
trial had.

SEC. 1313. (§ 20.) When a jury is demanded, the probate court must impanel a jury to try the case, in the manner provided for summoning and impanelling trial juries in courts of record, and the trial must be conducted in accordance with the provisions of part two, title eight, chapter four, of this code. A trial by the court must be conducted as provided in part two, title eight, chapter five, of this code.

Statutes of 1851, p. 450, § 20 ; 1867-8, p. 628, § 1.

Verdict of
the jury.

Judgment.

Appeal

SEC. 1314. (§§ 20, 23.) The jury, after hearing the case, must return a special verdict upon the issues submitted to them by the court ; upon which the judgment of the court must be rendered, either admitting the will to probate or rejecting it. In either case, the proofs of the subscribing witnesses must be reduced to writing, and an order of the court admitting the will to probate made, and the will and proofs recorded. Motions for new trials may be made, heard and determined, and appeals taken from orders made thereon, in the manner provided in this code for civil actions.

Statutes of 1851, p. 450, §§ 20, 23 ; 1861, p. 630, § 9.

NOTE.—The provision regarding costs is omitted, it being provided for in sections 1022-4.

Witnesses,
who and how
many to be
examined.

SEC. 1315. (§§ 21, 22.) If the will is contested, all the subscribing witnesses who are present in the county, and who are of sound mind, must be produced and examined,

and the death, absence or insanity of any of them must be satisfactorily shown to the court. If none of the subscribing witnesses reside in the county at the time appointed for proving the will, the court may admit the testimony of other witnesses to prove the sanity of the testator and the execution of the will; and as evidence of the execution it may admit proof of the handwriting of the testator and of the subscribing witnesses, or any of them.

Proof of
handwriting
admitted,
when.

Statutes of 1851, p. 450, §§ 21, 22.

SEC. 1316. (§ 23.) The testimony of each witness, reduced to writing and signed by him, shall be good evidence in any subsequent contests concerning the validity of the will, or the sufficiency of the proof thereof, if the witness be dead, or has permanently removed from this state.

Testimony
reduced to
writing for
future evi-
dence.

Statutes of 1851, p. 450, § 23.

SEC. 1317. (§ 24.) If the court is satisfied, upon the proof taken or from the facts found by the jury, that the will was duly executed, and that the testator at the time of its execution was of sound and disposing mind, and not acting under restraint, undue influence or fraudulent misrepresentation, a certificate of the proof and the facts found, signed by the probate judge and attested by the seal of the court, must be attached to the will.

If proved,
certificate to
be attached.

Statutes of 1850, p. 378 ; 1851, p. 450, § 24 ; 1855, p. 132, § 2.

SEC. 1318. (§ 25.) The will and a certificate of the proof thereof, together with all the testimony taken, must be filed by the clerk, and recorded by him in a book to be provided for the purpose.

Will and
proof to be
filed and
recorded.

Statutes of 1851, p. 451, § 25.

NOTE.—Section 26 (Stat. 1851, p. 451) is omitted, it being provided for in part IV of this code.

ARTICLE III.

PROBATE OF FOREIGN WILLS.

SECTION 1322. Wills proved in other states to be recorded, when and where.

1323. Proceedings on the production of a foreign will.

1324. Hearing proofs of probate of foreign will.

Wills proved
in other
states to be
recorded,
when and
where.

SEC. 1322. (§ 27.) All wills duly proved and allowed in any other of the United States, or in any foreign country or state, may be allowed and recorded in the probate court of any county in which the testator shall have left any estate, if it has been executed in conformity with the laws of this state.

Statutes of 1851, p. 451, § 27 ; 1863, p. 37, § 1.

Proceedings
on the pro-
duction of a
foreign will.

SEC. 1323. (§ 28.) When a copy of the will and the probate thereof, duly authenticated, shall be produced by the executor, or by any other person interested in the will, with a petition for letters, the same must be filed, and the court or judge must appoint a time for the hearing; notice whereof must be given as hereinbefore provided for an original petition for the probate of a will.

Statutes of 1851, p. 451, § 28 ; 1864, p. 367, § 3.

Hearing
proof of pro-
bate of for-
eign will.
N. S.

SEC. 1324. (§ 29.) If, on the hearing, it appears that the will was executed in conformity with the laws of this state, and was proved and allowed in conformity with the laws of the state or foreign country whence it purports to be authenticated, and these facts are duly authenticated, the certified copy must be allowed as the will of the decedent, and the original probate as its proper probate, and be here admitted to record and have the same force and effect as a will originally admitted to probate in this court. The certified copy shall also be prima facie evidence of the death of the testator.

Statutes of 1851, p. 451, § 29 ; 1864, p. 368, § 4.

ARTICLE IV.

CONTESTING WILL AFTER PROBATE.

- SECTION 1327. The probate may be contested within one year.
1328. Citation to be issued to parties interested.
1329. The hearing had on proof of service.
1330. Petitions to revoke probate of will tried by jury or court.
Judgment, what.
1331. On revocation of probate, powers of executor, etc., ceases,
but not liable for acts in good faith.
1332. Costs and expenses, by whom paid.
1333. Probate, when conclusive. One year after removal of disability given to infants and others.
1334. District court may set aside will, or decree admitting it to probate, or establish one lost or destroyed.

Sec. 1327. (§ 30.) When a will has been admitted to probate, any person interested may, at any time within one year after such probate, contest the same or the validity of the will. For that purpose he must file in the court in which the will was proved, a petition in writing, containing his allegations against the validity of the will or against the sufficiency of the proof, and praying that the probate may be revoked.

The probate may be contested within one year.

Statutes of 1851, p. 451, § 30.

Sec. 1328. (§ 31.) Upon the filing of the petition a citation must be issued to the executors of the will, or to the administrators with the will annexed, and to all the legatees mentioned in the will, residing in the state; or to their guardians, if any of them are minors; or their personal representatives, if any of them are dead; requiring them to appear before the court on some day of a regular term therein specified, to show cause why the probate of the will should not be revoked.

Citation to be issued to parties interested.

Statutes of 1851, p. 451, § 31.

Sec. 1329. (§ 32.) At the time appointed for showing cause, or at any time to which the hearing is postponed, personal service of the citations having been made upon any persons named therein, the court must proceed to try the issues of fact joined in the same manner as in an original contest of a will.

The hearing had on proof of service

Statutes of 1851, p. 451, § 32.

Sec. 1330. (§ 33.) In all cases of petitions to revoke the probate of a will, wherein the original probate was granted without a contest, on written demand of either party, filed three days prior to the hearing, a trial by jury must be had as in cases of the contest of an original petition to admit a will to probate. If, upon hearing the proofs of the parties, the jury shall find, or if no jury is had, the court shall decide, that the will is for any reason invalid, or that it is not sufficiently proved to be the last will of the testator, the probate must be annulled and revoked. Appeals may be taken therefrom as hereinafter provided for original applications.

Petitions to revoke probate of will tried by jury or court.
N. S.

Judgment, what.

Statutes of 1851, p. 451, § 33.

On revoca-
tion of pro-
bate, powers
of executor,
etc., ceases,
but not liable
for acts in
good faith.

SEC. 1331. (§ 34) Upon the revocation being made, the powers of the executor or administrator with the will annexed must cease; but such executor or administrator shall not be liable for any act done in good faith previous to the revocation.

Statutes of 1851, p. 451, § 34.

Costs and
expenses, by
whom paid.

SEC. 1332. (§ 35.) The fees and expenses must be paid by the party contesting the validity or probate of the will, if the will or probate is confirmed. If the probate is revoked, the costs must be paid by the party who resisted the revocation, or out of the property of the decedent, as the court directs.

Statutes of 1851, p. 452, § 35; 1861, p. 630, § 12.

Probate,
when con-
clusive.

One year
after remov-
al of disabil-
ity given to
infants and
others.

SEC. 1333. (§ 36.) If no person, within one year after the probate of a will, contests the same or the validity thereof, the probate of the will is conclusive; saving to infants, married women and persons of unsound mind a like period of one year after their respective disabilities are removed within which to petition for the revocation of any will in which they are interested.

Statutes of 1851, p. 452, § 36.

District
court may
set aside will
or decree
admitting it
to probate,
or establish
one lost or
destroyed.

SEC. 1334. The district court may set aside a will obtained by fraud or undue influence, and may declare any paper purporting to be a last will and testament null and void, on the ground of fraud and forgery; and set aside any order or decree of a probate court admitting to probate any supposed will, when the same has been obtained by fraud, concealment or perjury; and may establish a lost or destroyed will.

Statutes of 1862, p. 27, § 4.

ARTICLE V.

PROBATE OF LOST OR DESTROYED WILL.

SECTION 1338. Proof of lost or destroyed will to be taken.

1339. Must have been in existence at time of death.

1340. To be certified, recorded and letters thereon granted.

1341. Court to restrain injurious acts of executors or administrators during proceedings to prove lost will.

Sec. 1338. (§ 37.) Whenever any will is lost or destroyed, the probate court must take proof of the execution and validity thereof and establish the same; notice to all persons interested being first given, as prescribed in regard to proofs of wills in other cases. All the testimony given must be reduced to writing and signed by the witnesses.

Proof of lost or destroyed will to be taken.

Statutes of 1851, p. 452, § 37.

Sec. 1339. (§ 38.) No will shall be proved as a lost or destroyed will, unless the same is proved to have been in existence at the time of the death of the testator, or is shown to have been fraudulently destroyed in the lifetime of the testator, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses.

Must have been in existence at time of death

Statutes of 1851, p. 452, § 38.

Sec. 1340. (§ 39) When a lost will is established, the provisions thereof must be distinctly stated and certified by the probate judge, under his hand and the seal of his court, and the certificate, together with the testimony upon which it is founded, must be filed and recorded as other wills are filed and recorded, and letters testamentary or of administration, with the will annexed, must be issued thereon, in the same manner as upon wills produced and duly proved.

To be certified, recorded and letters thereon granted.

Statutes of 1851, p. 452, § 39.

Sec. 1341. (§ 40.) If, before or during the pendency of an application to prove a lost or destroyed will, letters of administration are granted on the estate of the testator, or letters testamentary of any previous will of the testator are granted, the court must restrain the administrators or executors so appointed from any acts or proceedings which would be injurious to the legatees or devisees claiming under the lost or destroyed will.

Court to restrain injurious acts of executors or administrators during proceedings to prove lost will.

Statutes of 1851, p. 452, § 40.

ARTICLE VI.

THE PROBATE OF NUNCUPATIVE WILLS.

Section 1344. Nuncupative wills, when and how admitted to probate.

1345. Additional requirements in probate of nuncupative wills.

1346. Contests and appointments to conform to provisions as to other wills.

Nuncupative
wills, when
and how
admitted to
probate.
N. S.

SEC. 1344. (§ 8.) Nuncupative wills may at any time, within six months after the testamentary words are spoken by the decedent, be admitted to probate, on petition and notice as provided in article two, chapter two, of this title. The petition, in addition to the jurisdictional facts, must allege that the testamentary words or the substance thereof were reduced to writing within thirty days after they were spoken, which writing must accompany the petition.

Statutes of 1850, p. 178, § 8.

Additional
requirem'ts
in probate of
nuncupative
wills.
N. S.

SEC. 1345. (§ 9.) The probate court must not receive or entertain a petition for the probate of a nuncupative will, until the lapse of fourteen days from the death of the testator, nor must such petition at any time be acted on until the testamentary words are, or their substance is, reduced to writing and filed with the petition, nor until the surviving husband or wife (if any), and all other persons resident in the state or county, interested in the estate, are notified as hereinbefore provided.

Statutes of 1850, p. 178, § 9.

Contests
and appoint-
ments to
conform to
provisions as
to other wills
N. S.

SEC. 1346. Contests of the probate of nuncupative wills and appointments of executors and administrators of the estate devised thereby must be had, conducted and made as hereinbefore provided in cases of the probate of written wills.

CHAPTER III.

OF EXECUTORS AND ADMINISTRATORS, THEIR LETTERS, BONDS, REMOVALS AND SUSPENSIONS.

ARTICLE I. LETTERS TESTAMENTARY AND OF ADMINISTRATION, HOW AND TO WHOM ISSUED.

II. FORM OF LETTERS.

III. ORDER IN WHICH LETTERS ARE GRANTED.

IV. PETITION AND CONTEST FOR LETTERS, AND ACTION THEREON.

V. REVOCATION OF LETTERS AND PROCEEDINGS THEREFOR.

VI. OATHS AND BONDS OF EXECUTORS AND ADMINISTRATORS.

VII. SPECIAL ADMINISTRATORS AND THEIR POWERS AND DUTIES.

VIII. WILLS FOUND AFTER LETTERS OF ADMINISTRATION GRANTED.

IX. DISQUALIFIED JUDGES AND TRANSFERS OF ADMINISTRATION.

X. REMOVALS AND SUSPENSIONS IN CERTAIN CASES.

ARTICLE I.

LETTERS TESTAMENTARY AND OF ADMINISTRATION, HOW
AND TO WHOM ISSUED.

SECTION 1349. To whom letters on proved will to issue.

1350. Who are incompetent as executors or administrators. Letters with will annexed to issue, when.

1351. Interested parties may file objections.

1352. Unmarried woman executrix or administratrix marrying, her authority ceases. Married woman named may be executrix but not administratrix.

1353. Executor of an executor.

1354. Letters of administration *durante minore estate*.

1355. Acts of a portion of executors valid.

1356. Authority of administrators with will annexed. Letters, how issued.

SEC. 1349. (§ 41.) The court admitting a will to probate, after the same is proved and allowed, must issue letters thereon to the persons named therein as executors who are competent to discharge the trust, who must appear and qualify, unless objection is made as provided in section thirteen hundred and thirty-nine.

To whom
letters on
proved will
to issue.

Statutes of 1851, p. 452, § 41.

SEC. 1350. (§§ 42, 55.) No person is competent to serve as executor who, at the time the will is admitted to probate, nor shall any person be appointed administrator, who, at the time of his appointment, is—

Who are
incompetent
as executors
or adminis-
trators.

1. Under the age of majority.

2. Convicted of an infamous crime.

3. Adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence or want of understanding or integrity.

If the sole executor is, or all named as executors are, incompetent, renounce the right to or fail to apply for letters, or to appear and qualify, letters of administration with the will annexed must be issued.

Letters with
the will
annexed to
issue, when.

Statutes of 1851, pp. 453-4, §§ 42, 55; 1861, p. 631, §§ 13, 18.

SEC. 1351. (§ 43.) Any person interested in a will may file objections in writing, to granting letters testamentary to the persons named as executors, or any of them, and the objections must be heard and determined by the court; a petition may, at the same time, be filed

Interested
parties may
file objection

for the issuance of letters of administration with the will annexed.

Statutes of 1851, p. 453, § 43 ; 1861, p. 631, § 13.

Unmarried woman executrix or administratrix marrying, her authority ceases. Married woman named may be executrix but not administratrix.

SEC. 1352. (§§ 44, 56.) When an unmarried woman, appointed executrix or administratrix, marries, her authority is extinguished. When a married woman is named as executrix, she may be appointed and serve in every respect as a feme sole, but administration must not be granted to, or on the request of, a married woman.

Statutes of 1851, p. 453, §§ 44, 56 ; 1861, p. 631, § 15 ; 1865-6, p. 765, § 2 ; 1870, p. 637, § 1.

Executor of an executor.

SEC. 1353. (§ 45.) No executor of an executor shall, as such, be authorized to administer on the estate of the first testator, but on the death of the sole or surviving executor of any last will, letters of administration with the will annexed, of the estate of the first testator, left unadministered, must be issued.

Statutes of 1851, p. 453, § 45.

Letters of administration durante minore etate

SEC. 1354. (§ 46) When a person absent from the state, or under the age of twenty-one years, is named executor, letters of administration with the will annexed must be granted during the absence or minority of the executor. The person who accepts the trust and qualifies, must have letters testamentary, and administer the estate until the return of the absentee, or the minor arrives at full age, when he must be admitted as joint executor ; or the court may, in its discretion, if the executor named is competent, on his return, or on attaining his majority, revoke the letters of administration and appoint him executor.

Statutes of 1851, p. 453, § 46.

Acts of a portion of executors valid.

SEC. 1355. (§ 47.) When all the executors named are not appointed by the court, those appointed have the same authority to perform all acts and discharge the trust, required by the will, as effectually for every purpose as if all were appointed and should act together ; where there are two executors or administrators, the act of one alone shall be effectual, if the other is absent from the state, or laboring under any legal disability from serving, or if he should have given his co-executor or co-administrator authority under seal, to act for both ; and where there are

more than two executors or administrators, the act of a majority shall be valid.

Statutes of 1851, p. 453, § 47; 1861, p. 631, § 16.

SEC. 1356. (§§ 48, 49.) Administrators with the will annexed have the same authority over the estates which approved executors are authorized to exercise, and their acts are as effectual for all purposes. Their letters must be signed by the clerk of the court directing letters to issue, with the seal thereof affixed.

Authority of administrators with will annexed

Letters, how issued.

Statutes of 1851, p. 453, §§ 48, 49.

ARTICLE II.

FORM OF LETTERS.

SECTION 1360. Form of letters testamentary.

1361. Form of letters of administration with the will annexed.

1362. Form of letters of administration.

SEC. 1360. (§ 50.) Letters testamentary must be substantially in the following form: State of California, county of _____. The last will of A. B., deceased, a copy of which is hereto annexed, having been proved and recorded in the probate court of the county of _____, C. D., who is named therein as such, is hereby appointed executor. Witness, G. H., clerk of the probate court of the county of _____, with the seal of the court affixed, the _____ day of _____, A. D. 18— (seal). By order of the court, G. H., clerk.

Form of letters testamentary.

Statutes of 1851, p. 453, § 50.

SEC. 1361. (§ 51.) Letters of administration with the will annexed must be substantially in the following form: State of California, county of _____. The last will of A. B., deceased, a copy of which is hereto annexed, having been proved and recorded in the probate court of the county of _____, and there being no executor named in the will (or as the case may be), C. D. is hereby appointed administrator with the will annexed. Witness, G. H., clerk of the probate court of the county of _____, with the seal of the court affixed, the _____ day of _____, A. D. 18— (seal). By order of the court, G. H., clerk.

Form of letters of administration with the will annexed.

Statutes of 1851, p. 454, § 51.

Form of
letters of ad-
ministration.

SEC. 1362. (§ 71.) Letters of administration must be signed by the clerk, under the seal of the court, and substantially in the following form: State of California, county of _____. C. D. is hereby appointed administrator of the estate of A. B., deceased. (Seal.) Witness, G. H., clerk of the probate court of the county of _____, with the seal thereof affixed, the _____ day of _____, A. D. 18—. By order of the court, G. H., clerk.

Statutes of 1851, p. 456, § 71.

ARTICLE III.

ORDER IN WHICH LETTERS ARE GRANTED.

SECTION 1365. Order of persons entitled to administer. Partner not to administer.

1366. Preference of persons equally entitled.

1367. In discretion of court to appoint administrator, when.

1368. When minor entitled, who appointed administrator.

Order of per-
sons entitled
to administer

SEC. 1365. (§ 52.) Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, and they are respectively entitled thereto in the following order:

1. The surviving husband or wife, or some competent person whom he or she may appoint.
2. The children.
3. The father or mother.
4. The brothers.
5. The sisters.
6. The grandchildren.
7. The next of kin entitled to share in the distribution of the estate.
8. The public administrator.
9. The creditors.
10. Any person legally competent.

Partner not
to administer

If the decedent was a member of a partnership at the time of his decease, the surviving partner must in no case be appointed administrator of his estate.

Statutes of 1851, p. 454, § 52; 1868-4, p. 522, § 1.

Preference of
persons
equally
entitled.

SEC. 1366. (§ 53.) Of several persons claiming and equally entitled to administer, males must be preferred

to females, and relatives of the whole to those of the half blood.

Statutes of 1851, p. 454, § 53.

SEC. 1367. (§ 54.) When there are several persons equally entitled to the administration, the court may grant letters to one or more of them; and when a creditor is claiming letters, the court may, in its discretion, at the request of another creditor, grant letters to any other person legally competent.

In discretion of court to appoint administrator, when.

Statutes of 1851, p. 454, § 54; 1863-4, p. 368, § 5.

SEC. 1368. (§ 57.) If any person entitled to administration is a minor, letters must be granted to his or her guardian, or any other person entitled to letters of administration, in the discretion of the court.

When minor entitled, who appointed administrator.

Statutes of 1851, p. 454, § 57; 1870, p. 637, § 2.

NOTE.—Sections 55 and 56 are embodied in sections 42 and 44, ante.

ARTICLE IV.

PETITION FOR LETTERS AND ACTION THEREON.

SECTION 1371. Applications, how made.

1372. When granted.

1373. Notice of application.

1374. Contesting applications.

1375. Hearing of application.

1376. Evidence of notice.

1377. Grant to any applicant.

1378. What proofs must be made before granting letters of administration.

1379. Letters may be granted to others than those entitled.

SEC. 1371. (§ 58.) Petitions for letters of administration must be in writing, signed by the applicant or his counsel, and filed with the clerk of the court, stating the facts essential to give the court jurisdiction of the case, and when the same is known to the administrator, he must state the names, ages and residence of the heirs of the decedent, and the value and character of the property; if the jurisdictional facts existed, but are not fully set forth in the petition, and afterwards proved in the course of administration, the decree or order of administration and subsequent proceedings are

Applications, how made.

not void on account of such want of jurisdictional averments.

Statutes of 1851, p. 454, § 58; 1861, p. 631, § 19.

When
granted.

SEC. 1372. (§ 59.) Letters of administration may be granted at a regular term of the court, or at a special term appointed by the judge for the hearing of the application.

Statutes of 1851, p. 454, § 59.

Notice of
application.

SEC. 1373. (§ 60.) When a petition, praying for letters of administration, is filed, the clerk must give notice thereof by causing notices to be posted in at least three public places in the county, one of which must be at the place where the court is held, containing the name of the decedent, the name of the applicant and the term of the court at which the application will be heard. Such notice must be given at least ten days before the hearing.

Statutes of 1851, p. 454, § 60.

Contesting
applications.
N. S.

SEC. 1374. (§ 61.) Any person interested may contest the petition, by filing written opposition thereto, on the ground of the incompetency of the applicant, or may assert his own rights to the administration and pray that letters be issued to himself. In the latter case the contestant must file the petition and give the notice required for an original petition, and the court must hear the two petitions together.

Statutes of 1851, p. 455, § 61; 1861, p. 631, § 20.

Hearing of
application.

SEC. 1375. (§ 62.) On the hearing, it being first proved that notice has been given as herein required, the court must hear the allegations and proofs of the parties, and order the issuing of letters of administration to the party best entitled thereto.

Statutes of 1851, p. 455, § 62.

Evidence of
notice.

SEC. 1376. (§ 63.) An entry in the minutes of the court, that the required proof was made and notice given, shall be prima facie evidence of the fact of such notice.

Statutes of 1851, p. 455, § 63.

Grant to any
applicant.

SEC. 1377. (§ 64.) Letters of administration must be granted to any applicant, though it appears that there are other persons having better rights to the administra-

tion, when such persons fail to appear and claim the issuing of letters to themselves.

Statutes of 1851, p. 455, § 64.

Sec. 1378. (§ 65.) Before letters of administration are granted on the estate of any person who is represented to have died intestate, the fact of his dying intestate must be proved by the testimony of the applicant or others, and the court may also examine any other person concerning the time, place and manner of his death, the place of his residence at the time, the value and character of his property, and whether or not the decedent left any will, and may compel any person to attend as a witness for that purpose.

What proofs must be made before granting letters of administration.

Statutes of 1851, p. 455, § 65; 1861, p. 631, § 21.

Sec. 1379. (§ 66.) Administration may be granted to one or more competent persons, although not entitled to the same, at the written request of the person entitled, filed in the court. When the person entitled is a non-resident of the state, affidavits or depositions, taken ex parte before any officer authorized by the laws of this state to take acknowledgments and administer oaths out of this state, may be received as prima facie evidence of the identity of the party, if free from suspicion, and the fact is established to the satisfaction of the court.

Letters may be granted to others than those entitled.

Statutes of 1851, p. 455, § 66; 1861, p. 631, § 22.

ARTICLE V.

REVOCATION OF LETTERS AND PROCEEDINGS THEREFOR.

SECTION 1383. Revocation of letters of administration.

1384. When petition filed, citation to issue.

1385. Hearing of petition for revocation.

1386. Prior rights of relatives entitles them to revoke prior letters.

Sec. 1383. (§ 67.) When letters of administration have been granted to any other person than the surviving husband or wife, child, father, mother, brother or sister of the intestate, any one of them may obtain the revocation of the letters and be entitled to the administration, by presenting to the probate court a petition praying the

Revocation of letters of administration.

revocation, and that letters of administration may be issued to him.

Statutes of 1851, p. 455, § 67 ; 1870, p. 400, § 1.

When petition filed, citation to issue.

SEC. 1384. (§ 68.) When such petition is filed, the clerk must issue a citation to the administrator to appear and answer the same on some day of a regular term of the court, or a special term appointed by the court or judge for the hearing thereof.

Statutes of 1851, p. 455, § 68 ; 1861, p. 633, § 23.

Hearing of petition for revocation.

SEC. 1385. (§ 69.) At the time appointed, the citation having been duly served and returned, the court must proceed to hear the allegations and proofs of the parties ; and if the right of the applicant is established, and he is competent, letters of administration must be granted to him, and the letters of the former administrator revoked.

Statutes of 1851, p. 455, § 69.

Prior rights of relatives entitles them to revoke prior letters.

SEC. 1386. (§ 70.) The surviving husband or wife, when letters of administration have been granted to a child, father, brother or sister of the intestate ; or any of such relatives, when letters have been granted to any other of them, may assert his prior right, and obtain letters of administration, and have the letters before granted revoked in the manner prescribed in the three preceding sections.

Statutes of 1851, p. 455, § 70 ; 1870, p. 400, § 2.

ARTICLE VI.

OATH AND BONDS OF EXECUTORS AND ADMINISTRATORS.

SECTION 1389. Administrator or executor to take oath. Letters and bond to be recorded.

1390. Bond of administrators, form and requirements of.

1391. Each, of more than one administrator, to give separate bonds.

1392. Several recoveries may be had on same bond.

1393. Bonds, and justification of sureties on. Must be approved.

1394. Citation and requirements of judge on deficient bond. Additional security.

1395. Right ceases, when.

1396. When bond may be dispensed with.

1397. Petition showing failing sureties and asking for further bonds.

SECTION 1398. Citation to executor, etc., to show cause against such application.

1399. Further security may be ordered.

1400. Neglecting to obey order.

1401. Suspending powers of executor, etc.

1402. Further security ordered without application of party in interest.

1403. Release of sureties.

1404. New sureties.

1405. Neglect to give new sureties forfeits letters.

1406. Applications to be determined out of term time.

SEC. 1389. (§ 72.) Before letters testamentary or of administration are issued to the executor or administrator, he must take and subscribe an oath or affirmation, before some officer authorized to administer oaths, that he will perform, according to law, the duties of executor or administrator, which must be attached to the letters. All letters testamentary and of administration issued to, and all bonds executed by, executors or administrators, with the affidavits and certificates thereon, must be forthwith recorded by the clerk of the court having jurisdiction of the estates, respectively, in a book to be kept by him in his office for that purpose.

Administrator or executor to take oath.

Letters and bond to be revoked.

Statutes of 1851, p. 456, § 72; 1863, p. 23, § 1.

SEC. 1390. (§ 73.) Every person to whom letters testamentary or of administration are directed to issue, must, before receiving them, execute a bond to the state of California, with two or more sufficient sureties, to be approved by the probate judge. In form, the bond must be joint and several, and the penalty must not be less than twice the value of the personal property and twice the probable value of the annual rents, profits and issues of the real property belonging to the estate, which values must be ascertained by the probate judge by examining on oath the party applying, and any other persons. The probate judge must require an additional bond whenever the sale of any real estate belonging to an estate is ordered by him; but no such additional bond must be required when it satisfactorily appears to the court that the penalty of the bond given before receiving letters, or of any bond given in place thereof, is equal to twice the value of the personal property remaining in, or that will come into, the possession of the executor or administrator, including the annual rents, profits and issues of real estate, and twice

Bond of administrators, form and requirements of.

the probable amount to be realized on the sale of the real estate ordered to be sold. The bond must be conditioned that the executor or administrator shall faithfully execute the duties of the trust according to law.

Statutes of 1851, p. 456, § 73; 1863-4, p. 368, § 6.

Each, of more than one administrator, to give separate bonds.

SEC. 1391. (§ 74.) When two or more persons are appointed executors or administrators, the probate judge must require and take a separate bond from each of them.

Statutes of 1851, p. 456, § 74.

Several recoveries may be had on same bond.

SEC. 1392. (§ 75.) The bond shall not be void upon the first recovery, but may be sued and recovered upon from time to time, by any person aggrieved, in his own name, until the whole penalty is exhausted.

Statutes of 1851, p. 456, § 75.

Bonds, and justification of sureties on.
N. S.

SEC. 1393. (§ 76.) In all cases where bonds or undertakings are required to be given, under this title, the sureties must justify thereon in the same manner and in like amounts as required by section ten hundred and fifty-seven of this code, and the certificate thereof must be attached to, and filed and recorded with the bond or undertaking. All such bonds and undertakings must be approved by the probate judge before being filed or recorded.

Must be approved.

Statutes of 1851, p. 456, § 76; 1863-4, p. 371, § 7.

NOTE.—The commission have endeavored to make the requirements, in giving bonds under this code, as to matters of form, sureties and justification, the same in all cases. Judge Reardon, of the fourteenth district, is entitled to credit for this suggestion.

Citation and requirements of judge on deficient bond.

SEC. 1394. (§ 76.) Before the probate judge approves any bond required under this title, he may of his own motion, or at any time after the approval of such bond, upon the motion of any person interested in the estate, supported by affidavit that any one or all of such sureties are not worth as much as they have justified to, order a citation to issue, requiring such sureties to appear before him, at a certain time and place, to testify touching their property and its value; and the judge must, at the time such citation is issued, cause a notice to be issued to the executor or administrator, requiring his appearance at

the return of the citation. Upon the return of the citation, the judge may swear the sureties, and such witnesses as may be produced, touching the property of such sureties and its value; and if upon such investigation the judge is satisfied that the bond is insufficient, he may require sufficient additional security, within such time as may be reasonable, not less than five days.

Additional security.

Statutes of 1851, p. 456, § 76; 1855, p. 300, § 3.

SEC. 1395. (§ 76.) If sufficient security is not given within the time fixed by the judge's order, the right of such executor or administrator to the administration shall cease, and the person next entitled to the administration on the estate, who will execute a sufficient bond, must be appointed to the administration.

Right ceases, when.

Statutes of 1851, p. 456, § 76; 1855, p. 300, § 4.

SEC. 1396. (§ 77.) When it is expressly provided in the will of a testator that no bond is required of the executor, letters testamentary may issue and sales of real estate be made and confirmed without any bond being given; but an executor to whom letters are issued without bond may at that time, or at any time afterward (when it appears from any cause necessary or proper), be required to file a bond, as in other cases.

When bond may be dispensed with.

Statutes of 1851, p. 456, § 77.

NOTE.—For obvious reasons, notwithstanding a will contains a provision exempting the named executor from giving bond, no letters should issue till bond is given. This section would have been made to conform to this idea, were it not for the last clause, which authorizes the court in certain contingencies to require a bond of an executor who is exempt therefrom by the terms of the will. This provision authorizes bonds to be required in all necessary cases, and is sufficient.

SEC. 1397. (§ 78.) Any person interested in an estate may, by verified petition, represent to the probate judge that the sureties of the executor or administrator thereof have become or are becoming insolvent, or that they have removed or are about to remove from the state, or from any other cause that the bond is insufficient, and ask that further security be required.

Petition showing falling sureties and asking for further bonds.

Statutes of 1851, p. 457, § 78.

Citation to executor, etc., to show cause against such application.

SEC. 1398. (§ 79) If the probate judge is satisfied that the matter requires investigation, a citation must be issued to the executor or administrator, requiring him to appear, at a time and place to be therein specified, to show cause why he should not give further security. The citation must be served personally on the executor or administrator, at least five days before the return day. If he has absconded, or cannot be found, it may be served by leaving a copy of it at his last place of residence.

Statutes of 1851, p. 457, § 79.

Further security may be ordered.

SEC. 1399. (§ 80.) On the return of the citation, or at such other time as the judge may appoint, he must proceed to hear the proofs and allegations of the parties. If it satisfactorily appears that the security is, from any cause, insufficient, he may make an order requiring the executor or administrator to give further security, or to file a new bond in the usual form, within a reasonable time, not less than five days.

Statutes of 1851, p. 457, § 80.

Neglecting to obey order

SEC. 1400. (§ 81.) If the executor or administrator neglects to comply with the order within the time prescribed, the judge must, by order, revoke his letters, and his authority must thereupon cease.

Statutes of 1851, p. 457, § 81.

Suspending powers of executor, etc.

SEC. 1401. (§ 82.) When a petition is presented, praying that an executor or administrator be required to give further security, or to give bond, if by the terms of the will no bond was originally required, and when it is also alleged, on oath, that the executor or administrator is wasting the property of the estate, the judge may, by order, suspend his powers until the matter can be heard and determined.

Statutes of 1851, p. 457, § 82.

Further security ordered without application of party in interest.

SEC. 1402. (§ 83.) When it comes to his knowledge that the bond of any executor or administrator is, from any cause, insufficient, the probate judge, without any application, must cause him to be cited to appear and show cause why he should not give further security, and must proceed thereon as upon the application of any person interested.

Statute of 1851, p. 457, § 83.

SEC. 1403. (§ 84.) When a surety of any executor or administrator desires to be released from responsibility on account of future acts, he may make application to the probate court or judge for relief. The court or judge must cause a citation to the executor or administrator to be issued, and served personally, requiring him to appear at a time and place to be therein specified, and to give other security; if he has absconded, left or removed from the state, or if he cannot be found, after due diligence and inquiry, service may be made by leaving a copy at his last place of residence, if the same can be ascertained, and by such publication as the court or probate judge may order.

Release of
sureties

Statutes of 1861, p. 634, § 26.

SEC. 1404. (§ 85.) If new sureties be given to the satisfaction of the judge, he may thereupon make an order that the sureties who applied for relief shall not be liable on their bond for any subsequent act, default or misconduct of the executor or administrator.

New sureties

Statutes of 1851, p. 457, § 85.

SEC. 1405. (§ 86.) If the executor or administrator neglects or refuses to give new sureties, to the satisfaction of the judge, on the return of the citation, or within such reasonable time as the judge shall allow, unless the surety making the application shall consent to a longer extension of time, the court or judge must, by order, revoke his letters.

Neglect to
give new
sureties for-
feits letters.

Statutes of 1851, p. 457, § 86 ; 1861, p. 634, § 27.

SEC. 1406. (§ 87) The applications authorized by the nine preceding sections of this chapter may be heard and determined out of term time. All orders made therein must be entered upon the minutes of the court.

Applications
to be deter-
mined out of
term time.

Statutes of 1851, p. 458, § 87.

ARTICLE VII.

SPECIAL ADMINISTRATORS AND THEIR POWERS AND DUTIES.

SECTION 1411. Special administrator, when appointed.

1412. Special letters may be issued out of term time.

1413. Preference given to persons entitled to letters.

1414. Special administrator to give bond and take oath.

SECTION 1415. Duties of special administrator.

1416. When letters testamentary or of administration are granted, special administrator's powers cease.

1417. Special administrator to render account.

1418. Remaining administrator or executor to continue when his colleagues are disqualified.

1419. Who to act when all acting were incompetent.

Special administrator, when appointed.

SEC. 1411. (§§ 88, 95, 282.) When there is delay in granting letters testamentary or of administration, from any cause, or when such letters are granted irregularly, or no sufficient bond is filed as required, or when no application is made for such letters, or when an administrator or executor dies or is suspended or removed, the probate judge must appoint a special administrator to collect and take charge of the estate of the decedent, in whatever county or counties the same may be found, and to exercise such other powers as may be necessary for the preservation of the estate; or he may direct the public administrator of his county to take charge of the estate.

Statutes of 1851, p. 485, § 282; 1851, p. 458, §§ 88, 95; 1855, p. 133, § 4; 1861, p. 652, § 101; *Beckett vs. Selover*, 7 Cal. 215.

Special letters may be issued out of term time.

SEC. 1412. (§ 89.) The appointment may be made out of term time, and without notice, and must be made by entry upon the minutes of the court, specifying the powers to be exercised by the administrator. Upon such order being entered, and after the person appointed has given bond, the clerk must issue letters of administration to such person, in conformity with the order.

Statutes of 1851, p. 458, § 89.

Preference given to persons entitled to letters.

SEC. 1413. (§ 90.) In making the appointment of a special administrator, the probate judge must give preference to the person entitled to letters testamentary or of administration, but no appeal must be allowed from the appointment.

Statutes of 1851, p. 458, § 90.

Special administrator to give bond and take oath.

SEC. 1414. (§ 91.) Before any letters issue to any special administrator, he must give bond in such sum as the probate judge may direct, with sureties to the satisfaction of the judge, conditioned for the faithful performance of his duties; and he must take the usual oath and have the same indorsed on his letters.

Statutes of 1851, p. 458, § 91.

SEC. 1415. (§ 92.) The special administrator must collect and preserve for the executor or administrator, all the goods, chattels, debts and effects of the decedent, all incomes, rents, issues and profits, claims and demands, of the estate; must take the charge and management of, enter upon and preserve from damage, waste and injury, the real estate, and for any such and all necessary purposes, may commence and maintain, or defend, suits and other legal proceedings, as an administrator; he may sell such perishable property as the probate court may order to be sold, and exercise such other powers as are conferred upon him by his appointment, but in no case is he liable to an action by any creditor on a claim against the decedent.

Duties of
special ad-
ministrator.

Statutes of 1851, p. 458, § 92; 1861, p. 634, § 28.

SEC. 1416. (§ 93.) When letters testamentary or of administration on the estate of the decedent have been granted, the powers of the special administrator cease, and he must forthwith deliver to the executor or administrator all the property and effects of the decedent in his hands; and the executor or administrator may be permitted to prosecute to final judgment any suit commenced by the special administrator.

When letters
testamentary
or of admin-
istration are
granted,
special ad-
ministrator's
powers cease

Statutes of 1851, p. 458, § 93.

SEC. 1417. (§ 94.) The special administrator must render an account, on oath, of his proceedings, in like manner as other administrators are required to do.

Special ad-
ministrator
to render
account.

Statutes of 1851, p. 458, § 94.

NOTE.—Section 95 is embodied in section 1411, ante.

SEC. 1418. (§ 96.) In case any one of several executors or administrators, to whom letters are granted, dies, becomes lunatic, is convicted of an infamous crime, or otherwise becomes incapable of executing the trust, or in case the letters testamentary or of administration are revoked or annulled, with respect to any one executor or administrator, the remaining executor or administrator must proceed to complete the execution of the will or administration.

Remaining
executor or
administra-
tor to con-
tinue when
colleagues
are disquali-
fied.

Statutes of 1851, p. 459, § 96.

SEC. 1419. (§ 97.) If all such executors or administrators die or become incapable, or the power and authority

Who to act
when all act-
ing were
incompetent

of all of them is revoked, the probate court must issue letters of administration with the will annexed, or otherwise, to the widow or next of kin, or others, in the same order and manner as is directed in relation to original letters of administration. The administrators so appointed must give bond in the like penalty, with like sureties and conditions, as hereinbefore required of administrators, and shall have the like power and authority.

Statutes of 1851, p. 459, § 97.

ARTICLE VIII.

WILLS FOUND AFTER LETTERS OF ADMINISTRATION GRANTED, AND MISCELLANEOUS PROVISIONS.

SECTION 1423. On proof of will, after grant of letters of administration, letters revoked.

1424. Power of executor in such a case.

1425. Executor or administrator may resign, when. Court to appoint successor. Liability of out-goer.

1426. All acts of executor, etc., valid until his power is revoked.

On proof of will, after grant of letters of administration, letters revoked.

SEC. 1423. (§ 98.) If, after granting letters of administration on the ground of intestacy, a will of the decedent is duly proved and allowed by the court, the letters of administration must be revoked, and the power of the administrator ceases, and he must render an account of his administration within such time as the court shall direct.

Statutes of 1851, p. 459, § 98.

Power of executor in such a case.

SEC. 1424. (§ 99.) In such case, the executor or the administrator with the will annexed is entitled to demand, sue for, recover and collect all the rights, goods, chattels, debts and effects of the decedent remaining unadministered, and may be admitted to prosecute to final judgment any suit commenced by the administrator before the revocation of his letters of administration.

Statutes of 1851, p. 459, § 99.

Executor or administrator may resign, when

SEC. 1425. (§ 100) Any executor or administrator may, at any time, by writing, filed in the probate court, resign his appointment, having first settled his accounts and delivered up all the estate to the person whom the

court shall appoint to receive the same. If, however, by reason of any delays in such settlement and delivering up of the estate, or for any other cause, the circumstances of the estate or the rights of those interested therein require it, the court may, at any time before settlement of accounts and delivering up of the estate is completed, revoke the letters of such executor or administrator, and appoint, in his stead, an administrator, either special or general, in the same manner as is directed in relation to original letters of administration. The liability of the outgoing executor or administrator, or of the sureties on his bond, shall not be in any manner discharged, released or affected by such appointment or resignation. A delivery of the entire estate to his successor or the person appointed to receive the same, discharges the outgoing executor or administrator and his sureties from further liability, and the court must so order it.

Court to
appoint
successor.

Liability of
out-goer.

Statutes of 1851, p. 457, § 100; 1858, p. 105, § 1.

SEC. 1426. (§ 101.) All acts of an executor or administrator, as such, before the revocation of his letters testamentary or of administration, are as valid, to all intents and purposes, as if such executor or administrator had continued lawfully to execute the duties of his trust.

All acts of
executor,
etc., valid
until his
power is
revoked.

Statutes of 1851, p. 459, § 101.

NOTE.—Section 102 (Stat. 1851, p. 459) is omitted, its office being supplied in part IV of this code, under title "Evidence."

ARTICLE IX.

DISQUALIFIED JUDGES AND TRANSFERS OF ADMINISTRATORS.

SECTION 1430. When judge not to act.

1431. Judge being disqualified, proceedings to be transferred, and where.

1432. Transfer not to change right to administer. Re-transfer, how made.

1433. When proceedings to be returned to original court.

SEC. 1430. (§ 103) No probate court shall admit to probate any will, or grant letters testamentary or of administration, in any case where the judge thereof is interested as next of kin to the decedent, or as a leg-

When judge
not to act.

atee or devisee under the will, or when he is named as executor or trustee in the will, or is a witness thereto, or is in any other manner interested or disqualified from acting.

Statutes of 1851, p. 459, § 103 ; 1863-4, p. 369, § 9.

Judge being disqualified, proceedings to be transferred, and where.

SEC. 1431. (§ 104.) When a petition is filed in the probate court, praying for admission to probate of a will, or for granting letters testamentary or of administration, or when proceedings are pending in the probate court for the settlement of an estate, and the presiding judge of the court is disqualified to act from any cause, upon his own or the motion of any person interested in the estate, he must make an order transferring the proceeding to the probate court of an adjoining county ; and the clerk of the court ordering the transfer must transmit to the clerk of the court to which the proceeding is ordered to be transferred, a certified copy of the order, and all the papers on file in his office in the proceeding ; and thereafter the probate court to which the proceeding is transferred shall exercise the same authority and jurisdiction over the estate, and all matters relating to the administration thereof, as if it had original jurisdiction of the estate.

Statutes of 1851, p. 460, § 104 ; 1865-6, p. 328, § 1.

Transfer not to change right to administer.

Re-transfer, how made.

SEC. 1432. (§ 104) The transfer of a proceeding from one court to another, as provided for in the preceding section, shall not affect the right of any person to letters testamentary or of administration on the estate transferred, but the same persons are entitled to letters testamentary or of administration on the estate, in the order hereinbefore provided. If, before the administration is closed of any estate so transferred, as herein provided, another person is elected or appointed, and qualified, as probate judge of the county wherein such proceeding was originally commenced, who is not disqualified to act in the settlement of the estate, and the causes for which the proceeding was transferred no longer exist, any person interested in the estate may have the proceeding returned to the court from which it was originally transferred, by filing a petition setting forth these facts, and moving the court therefor.

Statutes of 1851, p. 460, § 104 ; 1865-6, p. 329, § 1.

Sec. 1433. (§ 104.) On hearing the motion, if the facts required by the preceding section to be set out in the petition are satisfactorily shown, and it further appears to the court that the convenience of parties interested would be promoted by such change, the judge must make an order, transferring the proceeding back to the probate court where it was originally commenced; and the clerk of the court ordering the transfer must transmit to the clerk of the court in which the proceeding was originally commenced a certified copy of the order, and all the original papers on file in his office in the proceeding; and the court where the proceeding was originally commenced shall thereafter have jurisdiction and power to make all necessary orders and decrees to close up the administration of the estate.

When proceedings to be returned to original court.

Statutes of 1851, p. 460, § 104; 1865-6, p. 329, § 1.

ARTICLE X.

REMOVALS AND SUSPENSIONS IN CERTAIN CASES.

Section 1436. Suspension of powers of executor.

1437. Executor to have notice of his suspension, and to be cited to appear.

1438. Any party interested may appear on hearing.

1439. Notice to absconding executors and administrators.

1440. May compel attendance.

Sec. 1436. (§ 281.) Whenever the probate judge has reason to believe, from his own knowledge or from credible information, that any executor or administrator has wasted, embezzled or mismanaged, or is about to waste or embezzle the property of the estate committed to his charge, or has committed or is about to commit a fraud upon the estate, or is incompetent to act, or has permanently removed from the state, or has wrongfully neglected the estate, or has long neglected to perform any act as such executor or administrator, he must, by an order entered upon the minutes of the court, suspend the powers of such executor or administrator, until the matter is investigated.

Suspension of powers of executor.

Statutes of 1851, p. 485, § 281; 1861, p. 652, § 100.

NOTE.—Section 282 (Stat. 1851, p. 485) is embodied in section 1411, and omitted here.

Executor to have notice of his suspension, and to be cited to appear.

SEC. 1437. (§ 283.) When such suspension is made, notice thereof must be given to the executor or administrator, and he must be cited to appear and show cause why his letters should not be revoked. If he fail to appear in obedience to the citation, or, if appearing, the court is satisfied that there exists cause for his removal, his letters must be revoked, and letters of administration granted anew, as the case may require.

Statutes of 1851, p. 485, § 283.

Any party interested may appear on hearing.

SEC. 1438. (§ 284.) At the hearing, any person interested in the estate may appear and file his allegations in writing, showing that the executor or administrator should be removed; to which the executor or administrator may demur or answer, as hereinbefore provided. The issues raised must be heard and determined by the court or a jury.

Statutes of 1851, p. 485, § 284.

Notice to absconding executors and administrators.

SEC. 1439. (§ 285.) If the executor or administrator has absconded or conceals himself, or has removed or absented himself from the state, notice may be given him of the pendency of the proceedings by publication, in such manner as the court may direct, and the court may proceed upon such notice as if the citation had been personally served.

Statutes of 1851, p. 485, § 285; 1861, p. 652, § 102.

May compel attendance

SEC. 1440. (§ 286.) In the proceedings authorized by the preceding sections of this article, for the removal of an executor or administrator, the court may compel his attendance by attachment, and may compel him to answer questions, on oath, touching his administration, and, upon his refusal so to do, may commit him until he obey, or may revoke his letters, or both.

Statutes of 1851, p. 485, § 286; 1861, p. 652, § 103.

CHAPTER IV.

OF THE INVENTORY AND COLLECTION OF THE EFFECTS OF DECEDENTS.

ARTICLE I. INVENTORY, APPRAISEMENT AND POSSESSION OF ESTATE.

II. EMBEZZLEMENT AND SURRENDER OF PROPERTY OF ESTATE.

ARTICLE I.

INVENTORY, APPRAISEMENT AND POSSESSION OF ESTATE.

SECTION 1443. Inventory to be returned, including the homestead.

1444. Appraisement and pay of appraisers.

1445. Oath of appraisers and inventory, how made.

1446. Inventory to account for moneys. If all money, no appraisement necessary.

1447. Effect of naming a debtor executor.

1448. Discharge or bequest of debt against executor.

1449. To make oath to inventory.

1450. Letters may be revoked for neglect of administrator.

1451. Inventory of after discovered property.

1452. Administrator and executor to possess real and personal estate.

1453. Executor or administrator to deliver real estate to heirs or devisees at the end of ten months, unless there are debts to be satisfied.

1454. Personal estate first chargeable. Real estate, when to be sold.

SEC. 1443. (§ 105.) Every executor or administrator must make and return to the court, at its first term after his appointment, a true inventory and appraisement of all the estate of the decedent, real, personal or mixed, including the homestead, if any there is recorded, which has come to his possession or knowledge.

Inventory to be returned, including the homestead.

Statutes of 1851, p. 460, § 105.

SEC. 1444. (§ 106.) To make the appraisement, the probate judge or court must appoint three disinterested persons (any two of whom may act), who are entitled to receive a reasonable compensation for their services, to be allowed by the court or judge, on presentation of a bill of items therefor, including all necessary disbursements, sworn to by them and filed with the inventory, and must not exceed five dollars per day. If only one day's services are charged, the bill need not be sworn to. If any part of the estate is in any other county than that in which letters issued, appraisers thereof may be appointed, either by the probate judge having jurisdiction of the estate or by the probate judge of such other county, on request of the judge having jurisdiction.

Appraisement and pay of appraisers.

Statutes of 1851, p. 460, § 106; 1861, p. 634, § 29.

SEC. 1445. (§ 107.) Before proceeding to the execution of their duty, the appraisers, before any officer authorized

Oath of appraisers and inventory, how made.

to administer oaths, must take and subscribe an oath, to be attached to the inventory, that they will truly, honestly and impartially appraise the property which is exhibited to them, according to the best of their knowledge and ability. They must then proceed to estimate and appraise the property; each article must be set down separately, with the value thereof in dollars and cents, in figures, opposite to the articles, respectively; the inventory must contain all the estate of the decedent, real and personal, a statement of all debts, partnerships and other interests, bonds, mortgages, notes and other securities for the payment of money belonging to the decedent, specifying the name of the debtor in each security, the date, the sum originally payable, the indorsements thereon (if any), with their dates, and the sum which, in the judgment of the appraiser, may be collected on each debt, interest or security; the inventory must show, so far as the same can be ascertained by the executor or the administrator, what portion of the property is community property and what portion is the separate property of the decedent.

Statutes of 1851, p. 460, § 107; 1861, pp. 634-5, § 30.

Inventory to
account for
moneys.

If all money,
no appraisement
necessary.

SEC. 1446. (§ 108.) The inventory must also contain an account of all moneys belonging to the decedent which has come to the hands of the executor or administrator; and if none has come to his hands, the fact must be so stated in the inventory. If the whole estate consists of money, there need not be an appraisement, but an inventory must be made and returned as in other cases.

Statutes of 1851, p. 460, § 108; 1865-6, pp. 634-5, § 3.

Effect of
naming a
debtor
executor

SEC. 1447. (§ 109.) The naming of a person as executor does not thereby discharge him from any just claim which the testator has against him, but the claim must be included in the inventory, and the executor is liable for the same, as for so much money in his hands, when the debt or demand becomes due.

Statutes of 1851, p. 461, § 109.

Discharge of
bequest of
debt against
executor.

SEC. 1448. (§ 110.) The discharge or bequest in a will, of any debt or demand of the testator against the executor named, or any other person, is not valid against the creditors of the decedent, but is a specific bequest of the

debt or demand. It must be included in the inventory, and, if necessary, applied in the payment of his debts. If not necessary for that purpose, it must be paid in the same manner and proportion as other specific legacies.

Statutes of 1851, p. 461, § 110.

SEC. 1449. (§ 111.) The inventory must be signed by the appraisers, and the executor or administrator must take and subscribe an oath before an officer authorized to administer oaths, that the inventory contains a true statement of all the estate of the decedent which has come to his knowledge and possession, and particularly of all money belonging to the decedent, and of all just claims of the decedent against him. The oath must be indorsed upon or annexed to the inventory.

To make
oath to
inventory.

Statutes of 1851, p. 461, § 111; 1861, p. 635, § 31.

SEC. 1450. (§ 112.) If an executor or administrator neglects or refuses to return the inventory within the time prescribed, or within such further time, not exceeding two months, which the court or judge shall, for reasonable cause, allow, the court may, upon notice, revoke the letters testamentary or of administration, and the executor or administrator is liable on his bond for any injury to the estate, or any person interested therein, arising from such failure.

Letters may
be revoked
for neglect
of adminis-
trator.

Statutes of 1851, p. 461, § 112; 1861, p. 635, § 32.

SEC. 1451. (§ 113.) Whenever property not mentioned in an inventory that is made and filed, comes to the possession or knowledge of an executor or administrator, he must cause the same to be appraised in the manner prescribed in this article, and an inventory thereof to be returned within two months after the discovery; and the making of such inventory may be enforced, after notice, by attachment or removal from office.

Inventory
of after
discovered
property.

Statutes of 1851, p. 461, § 113.

SEC. 1452. (§ 114.) The executor or administrator must have possession of all the real and personal estate of the decedent, and receive the rents and profits of the real estate, until the estate is settled, or until delivered over by order of the probate court to the heirs or devisees; and must keep in good tenantable repair all houses,

Administra-
tor and
executor to
possess real
and personal
estate.

buildings and fixtures thereon, which are under his control. The heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate against any one except the executor or administrator, or those holding under either.

Statutes of 1851, p. 461, § 114.

NOTE.—The last clause of this section is new, and intended to place it within the power of parties more directly interested in the estate than the executor or administrator, to assert a right to real property and to maintain it, if possible, by an action at law.

Executor or administrator to deliver real estate to heirs or devisees at the end of ten months, unless there are debts to be satisfied.
N. S.

SEC. 1453. (§ 114.) Unless it satisfactorily appears to the probate court, that the rents, issues and profits of the real estate for a longer period, is necessary to be received by the executor or administrator, wherewith to pay the debts of the decedent then proved, or in action against the estate; or that it will probably be necessary to sell the real estate for the payment of such debts; at the end of ten months from the first publication of the notice to creditors, the court must direct the executor or administrator to deliver possession of all the real estate to the heirs at law or devisees.

Statutes of 1851, p. 461, § 114.

NOTE.—This is an entirely new section and the propriety of enacting it, it is presumed, will sufficiently appear on reading it. The same idea was embodied in the work of Judge Currey, of the former commission.

Personal estate first chargeable.

Real estate, when to be sold.

SEC. 1454. (§ 115.) The personal estate of the decedent which comes into the hands of the executor or administrator is first chargeable with the payment of the debts and expenses; if the goods, chattels, rights and credits in the hands of the executor or administrator is not sufficient to pay the debts of decedent, the expenses of administration and the allowance to the family, the whole of the real estate may be sold for that purpose by the executor or administrator, in the manner prescribed in article seven of this chapter.

Statutes of 1851, p. 462, § 115.

ARTICLE II.

EMBEZZLEMENT AND SURRENDER OF PROPERTY OF THE ESTATE.

SECTION 1458. Embezzling estate before grant of letters testamentary.

1459. Citation to person suspected to have embezzled estate, etc.

1460. Refusal to obey citation, penalty for, and for embezzlement.
May be compelled to disclose by imprisonment. Liable for double damages.

1461. Persons entrusted with estate of decedent may be cited to account.

SEC. 1458. (§ 116.) If any person, before the granting of letters testamentary or of administration, embezzles or alienates any of the moneys, goods, chattels or effects of a decedent, he is chargeable therewith and liable to an action by the executor or administrator of the estate, for double the value of the property so embezzled or alienated, to be recovered for the benefit of the estate.

Embezzling estate before grant of letters testamentary.

Statutes of 1851, p. 462, § 116.

SEC. 1459. (§ 117.) If any person interested in the estate of a decedent complains to the probate judge, on oath, that any person is suspected to have concealed, embezzled, smuggled, conveyed away or disposed of any moneys, goods or chattels of the decedent, or has in his possession or knowledge, any deeds, conveyances, lands, contracts or other writings, which contain evidences of, or tend to disclose the right, title, interest or claim of the decedent to any real or personal estate, or any claim or demand, or any last will, the judge may cite such person to appear before the probate court, and may examine him on oath upon the matter of such complaint. If such person is not in the county where letters have been granted, he may be cited and examined, either before the probate court of the county where he is found, or before the court issuing the citation. But if in the latter case he appears and is found innocent, his necessary expenses must be allowed him out of the estate.

Citation to person suspected to have embezzled estate, etc.

Statutes of 1851, p. 462, § 117.

SEC. 1460. (§ 118.) If the person so cited refuses to appear and submit to an examination, or to answer such interrogatories as may be put to him, touching the matters of the complaint, the court may, by warrant for that

Refusal to obey citation, penalty for, and for embezzlement.

May be compelled to disclose by imprisonment.

purpose, commit him to the county jail, there to remain in close custody until he submits to the order of the court or is discharged according to law. If, upon such examination, it appears that he has concealed, embezzled, smuggled, conveyed away or disposed of any moneys, goods or chattels of the decedent, or that he has in his possession or knowledge, any deeds, conveyances, bonds, contracts or other writings, containing evidences of, or tending to disclose the right, title, interest or claim of the decedent to, any real or personal estate, claim or demand, or any lost will of the decedent, the probate court may make an order requiring such person to disclose his knowledge thereof to the executor or administrator, and may commit him to the county jail, there to remain until the order is complied with or he is discharged according to law; and all such interrogatories and answers must be in writing, signed by the party examined, and filed in the probate court. The order for such disclosure, made upon such examination, must be prima facie evidence of the right of such administrator to such property, in any action brought for the recovery thereof; and any judgment recovered therein must be for double the value of the property as assessed by the court or jury, or for return of the property, and damages in addition thereto, equal to the value of such property. In addition to the examination of the party, witnesses may be produced and examined on either side.

Liable for double damages.

Statutes of 1851, p. 462, § 118; 1861, p. 635, § 33.

Persons entrusted with estate of decedent may be cited to account.

Sec. 1461. (§ 119.) The probate judge, upon the complaint, on oath, of any executor or administrator, may cite any person who has been entrusted with any part of the estate of the decedent, to appear before such court, and require him to render a full account, on oath, of any moneys, goods, chattels, bonds, accounts or other property or papers belonging to the estate, which has come to his possession in trust for the executor or administrator, and of his proceedings thereon; and if the person so cited refuses to appear and answer such account, the court may proceed against him as provided in the preceding section.

Statutes of 1851, p. 462, § 119.

CHAPTER V.

OF THE PROVISION FOR THE SUPPORT OF THE FAMILY, AND
OF THE HOMESTEAD.

ARTICLE I. OF THE PROVISION FOR THE SUPPORT OF THE FAMILY.

II. OF THE HOMESTEAD.

ARTICLE I.

OF THE PROVISION FOR THE SUPPORT OF THE FAMILY.

SECTION 1464. Widow and minor children may remain in decedent's house, etc.

1465. All property exempt from execution to be set apart for use of family.

1466. May make extra allowance.

1467. Payment of allowance.

1468. Property set apart, how apportioned between widow and children.

1469. Estates less than fifteen hundred dollars to go to wife and child; those less than three thousand to be summarily administered.

1470. When all property to go to children.

SEC. 1464. (§ 120.) When a person dies leaving a widow or minor children, the widow or children, until letters are granted and the inventory is returned, are entitled to remain in possession of the homestead, all the wearing apparel of the family, and of all the household furniture of the decedent, and are also entitled to a reasonable provision for their support, to be allowed by the probate judge.

Widow and minor children may remain in decedent's house, etc.

Statutes of 1851, pp. 462-3, § 120.

SEC. 1465. (§ 121.) Upon the return of the inventory, or at any subsequent time during the administration, the court or the probate judge may, on his own motion or on petition therefor, set apart for the use of the surviving husband or wife, or the minor children of the decedent, all property exempt from execution, including the homestead selected, designated and recorded. If none has been selected, designated and recorded, the judge or the court must select, designate, set apart and cause to be recorded a homestead for the use of the persons herein-

All property exempt from execution to be set apart for use of family.
N. S.

before named, in the manner provided in article two of this chapter, out of the real estate belonging to the decedent.

Statutes of 1851, p. 463, § 121; 1861, p. 636, § 34; 1865-6, p. 850, § 1; 1867-8, p. 172, § 1; 1870, p. 400, § 1.

NOTE.—This section, which has been so frequently amended by reference alone to the original section of the act of 1851, as section 121, received a judicial construction in the matter of the estate of Busse (35 Cal. 310), wherein it is held that this section, as it stood under the amendment of 1866 (Stat. 1865-6, p. 850, § 1), taken in connection with section 124, clearly recognizes the jurisdiction and authority of the probate court to set apart a homestead from the lands of an estate, though none had been recorded prior to the death of the decedent. The statute of 1870, p. 400, so far changes the section as to use the words, "husband or wife, or minor children," in the place of "family;" it would seem from this that the last legislature intended to vest the right of survivorship to the homestead property in the children as well as in either of the surviving parents. This right of the survivor to the title of the homestead is also clearly recognized in the matter of the estate of Delaney (37 Cal. 176). For these reasons we retain the main features of the act of 1870, giving the right of survivorship to parents or children, and shall modify and simplify the method of setting apart the homestead provided in the act of 1870, p. 793.

May make
extra allow-
ance.

SEC. 1466. (§ 122.) If the amount set apart be insufficient for the support of the widow and children, or either, the probate court or judge must make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family, according to their circumstances, during the progress of the settlement of the estate; which, in case of an insolvent estate, must not be longer than one year after granting letters testamentary or of administration.

Statutes of 1851, p. 463, § 122; 1861, p. 636, § 35.

Payment of
allowance.

SEC. 1467. (§ 123.) Any allowance made by the court or judge, in accordance with the provisions of this article, must be paid in preference to all other charges, except funeral charges and expenses of administration; and any such allowance, whenever made, may, in the discretion of the court or judge, take effect from the death of the decedent.

Statutes of 1851, p. 463, § 123; 1861, p. 636, § 36; 1863-4, p. 370, § 11.

NOTE.—An examination of the opinion of the learned Justice Sawyer, in the matter of the estate of Albert Busse (25 Cal. 313), will fully explain why the commission have deemed it unnecessary to retain section 124 (Stat. 1851). We have in this code designated all the property which is exempt from execution, and why repeat it here? It does not sufficiently appear why the homestead of the survivor should be confined to quantity of *country land or town lots*, under the reasoning of the court in the matter of the estate of Delaney (37 Cal. 176), since the constitutional limit in value (\$5,000) is retained.

SEC. 1468 (§ 125.) When property is set apart for the use of the family, in accordance with the provisions of this chapter, if the decedent left a widow and no minor child, such property is the property of the widow. If he left also a minor child or children, the one-half of such property shall belong to the widow and the remainder to the child, or in equal shares to the children, if there are more than one. If there is no widow, the whole belongs to the minor child or children.

Property set apart, how apportioned between widow and children.

Statutes of 1851, p. 463, § 125.

SEC. 1469. (§ 126.) If, on the return of the inventory of the estate of an intestate, it appears that the value of the whole estate does not exceed the sum of fifteen hundred dollars, the probate court, by a decree for that purpose, must assign for the use and support of the widow and minor child or children, if there be a widow or minor child, and if no widow, then for the children, if there are any, the whole of the estate, after the payment of the expenses of his last illness, funeral charges and expenses of the administration, and there must be no further proceedings in the administration unless further estate be discovered; and when it so appears that the value of the whole estate does not exceed the sum of three thousand dollars, it is in the discretion of the probate court to dispense with the regular proceedings, or any part thereof, prescribed in this title, and there must be had a summary administration of the estate, and an order of distribution thereof at the end of six months after the issuing of letters; the notice to creditors must be given to present their claims within four months after the first publication of such notice, and those not so presented are barred as in other cases.

Estates less than \$1,500 to go to wife and child; those less than \$3,000 to be summarily administered.

Statutes of 1851, p. 464, § 126; 1861, p. 636, § 37.

NOTE.—The changes here made are from *five* to *fifteen* hundred, in third line, and from *one* to *three* thousand, in thirteenth line. These changes were suggested by Judge Currey, of the former commission, and are concurred in by us.

When all property to go to children.

Sec. 1470. (§ 127.) If the widow has a maintenance derived from her own property equal to the portion set apart to her by the preceding sections of this article, the whole property so set apart, other than her half of the homestead, must go to the minor children.

Statutes of 1851, p. 464, § 127.

ARTICLE II.

OF THE HOMESTEAD.

SECTION 1474. Rights of survivor to homestead.

1475. Selected and recorded homestead set off to person entitled. Subsisting liens to be paid by solvent estate.

1476. Appraisers to carve out of the original exceeding five thousand dollars in value, a homestead, and report the same.

1477. Report of the appraisers. Majority and minority, which may be confirmed.

1478. Day to be set for confirming or rejecting the report of the appraisers. Appeal.

1479. If report rejected, other appraisers appointed. If again rejected, partition suit to be brought.

1480. Instead of dividing the homestead, who may take a deed thereof at appraised value.

1481. If no homestead is selected and recorded prior to death of decedent, one may be petitioned for.

1482. Court to direct partition suit in the district court, when. Proceedings thereon.

1483. If property is common or separate, court to cause appraisement and admeasurement to be made.

1484. New appraisement, when ordered. Instead of deeding property at appraised value, public sale to be ordered, when.

1485. Costs, to whom chargeable. Persons succeeding to rights of homestead owners have all their powers and rights.

1486. Who succeeds to unmarried person's homestead.

Rights of survivor to homestead. N. S.

Sec. 1474. (§ 10.) The homestead selected by the husband and wife, or either of them, during their coverture, and recorded while both are living, on the death of the husband or wife, vests absolutely in the survivor and their minor children, if any, jointly, one-half to the survivor and one-half to the children; but if no husband or wife survives, then in their minor children,

if any; and is not, nor is the proceeds of a sale thereof, subject to the payment of any debt or liability contracted by or existing against the husband and wife, or either of them, previous to or at the time of the death of such husband or wife, except such lien, debt or liability as the homestead was subject to at the time of the death of such husband or wife.

Statutes of 1851, p. 298, § 10; 1860, p. 312, § 4; 1862, p. 549, § 2.

NOTE.—This amendment enables a provident parent, before death, to provide for the children, against an improvident parent living.

SEC. 1475. (§ 121.) If the homestead selected and recorded prior to the death of the decedent is returned in the inventory appraised at not exceeding five thousand dollars in value, the probate court must by order set it off to the person in whom title is vested by the preceding section. If there are subsisting liens or encumbrances on the homestead, they must be paid out of the funds of the estate, if there remain sufficient for that purpose, after the payment of all claims allowed against the estate.

Selected and recorded homestead set off to person entitled.
N. S.

Subsisting liens to be paid by solvent estate.

Statutes of 1851, p. 463, § 121; 1867-8, p. 172, § 1; 1870, p. 794, § 1.

SEC. 1476. If the homestead, as selected and recorded, is appraised at more than five thousand dollars, the appraisers must, before they make their return, admeasure and set apart such portion of the original homestead, including the residence, or such portion of the residence as does not exceed five thousand dollars in value, and make report thereof, giving the metes, bounds and full description of the property and appurtenances by them set apart as a homestead; the appraisers must at the same time report the value of the entire house, if they have partitioned it; also, the house and the largest portion of the immediately adjacent land and buildings which together do not exceed five thousand dollars in value, each stated separately.

Appraisers to carve out of the original exceeding \$5,000 in value, a homestead, and report the same.
N. S.

SEC. 1477. Any two of the appraisers concurring may discharge the duties imposed upon the three, and make the report. A dissenting report may be made by the third appraiser. The report must state fully the acts of

Report of the appraisers.
N. S.

Majority and minority, which may be confirmed N. S.

the appraisers. Both reports may be heard and considered by the court in determining a confirmation or rejection of the majority report, but the minority report must in no case be confirmed.

Day to be set for confirming or rejecting the report of the appraisers. N. S.

SEC. 1478. When the report of the appraisers is filed, the court must set a day for hearing any objections thereto, from any one interested in the estate. There must be given the same notice thereof as is required in article one, chapter two, of the probate of a will. The objections must be in writing, and, together with such witnesses as may be produced for and against the report, be heard by the court. If the court is satisfied that the appraisement, or the partition and appraisement, was fairly and honestly conducted and made, the report, appraisement and partition must be confirmed; if not, rejected; and the order of the court made confirming the same is final, unless appealed to the supreme court, as provided in other cases under this title.

Appeal.

If report rejected, other appraisers appointed. N. S.

SEC. 1479. If the report is rejected and no appeal is taken therefrom, or if from any cause the first appraisers fail to make the required report, the court must appoint three disinterested householders, residents of the county, to appraise and admeasure the homestead, who must be sworn thereto, perform the duties and make report thereof, and the same proceedings for the confirmation or rejection thereof had, as provided in the two preceding sections. If the report be again rejected, and no appeal is taken, the court must direct the homestead claimant to bring action for partition of the homestead, in the district court, and must set apart the homestead as directed by the district court.

If again rejected, partition suit to be brought.

Instead of dividing the homestead, who may take a deed thereof at appraised value. N. S.

SEC. 1480. Instead of dividing a house or the land embraced in the homestead selected and recorded, the person entitled to the homestead by descent has the right to pay to the estate the excess of value at which the same is appraised over five thousand dollars, and receive a deed therefor, to be executed by such person as designated in the order of the court, conveying to him all the interest of the estate therein. If the claimant declines to make such payment, and signifies a preference for the value of the homestead rather than a partition between him and the

estate, any of the heirs or devisees may pay the appraised value and take a deed from the estate and the homestead claimant. Five thousand dollars of the purchase money must be paid by order of the court to the person entitled to the homestead.

SEC. 1481. If no homestead is selected, designated and recorded prior to the death of the decedent, any of the persons named in section fourteen hundred and seventy-four, entitled to succeed to a homestead, may petition the probate court to admeasure, appraise and set apart to them a homestead, from the real estate belonging to the decedent. The petition must set forth the name of the petitioner, his relation to decedent, the land from which it is desired to make the selection, the portion thereof selected and its estimated value, and whether the same be common or separate property of the decedent, or owned by decedent as joint tenant, tenant in common or as a coparcener.

If no homestead is selected and recorded prior to death of decedent, may be petitioned for.
N. S.

SEC. 1482. If the land from which the selection of the homestead is to be made is owned by the decedent as joint tenant, tenant in common, or as a coparcener, the probate court must so order, and the executor or administrator must proceed to have partition thereof made by action in the district court, as provided in this code; and when partition is so made and certified to the probate court, the probate court must, if the portion set apart to the estate does not exceed five thousand dollars in value, set the same apart to the claimant, if entitled thereto, and cause the same to be recorded; or, if a sale is had of the land by decree of the district or probate court, the proceeds of the sale belonging to the estate, not exceeding five thousand dollars, must be paid to such claimant.

Court to direct partition suit in the district court, when. Proceedings thereon.
N. S.

SEC. 1483. If the land and appurtenances from which the selection of homestead is sought, is common or separate property of the decedent, on filing the petition the court must appoint appraisers and cause the same to be admeasured, appraised, reported and confirmed or rejected, as provided in the preceding sections of this article; and in the event of a second rejection of the appraiser's report, and no appeal is taken, must direct action for partition to be instituted, and set apart a homestead, as pro-

If property is common or separate, court to cause appraisal and admeasurement to be made.
N. S.

vided in this article for setting apart a recorded homestead.

New appraisalment, when ordered.
N. S.

Instead of deeding property at appraised value, public sale to be ordered, when.

SEC. 1484. If it is made to appear to the probate court that any appraisalment of property, constituting or from which is to be selected the homestead claimed, or prayed to be set apart, is either too high or too low, or is unfairly or fraudulently made, the appraisalment, by order of the court, must be annulled and another had, as provided in this article in case of rejection of a report. Instead of the homestead claimant, or other heirs or devisees, taking the property in this section before mentioned, at its appraised value, as provided in section fourteen hundred and eighty, the court may, in its discretion, or on petition, direct a sale thereof to be had at public auction, after notice of sale given as provided for sales of real estate of a decedent in the course of administration, for the payment of debts or legacies. If more than five thousand dollars is not bid, no sale shall take place, but on report of the facts the property must be set apart as a homestead.

Costs, to whom chargeable.
N. S.
Persons succeeding to rights of homestead owners have all their powers and rights.

SEC. 1485. The costs of all proceedings in the probate court, provided for in this chapter, must be paid by the estate, as expenses of administration. Persons succeeding by purchase or otherwise to the interests, rights and title of successors to homesteads, or to the right to have homesteads set apart to them, as in this chapter provided, have all the rights and benefits conferred by law on the persons whose interests and rights they acquire.

Who succeeds to unmarried person's homestead
N. S.

SEC. 1486. On the death of an unmarried person having a homestead recorded, the title to the homestead vests in that person by whose act of residence with the decedent the right to secure a homestead was conferred. The homestead must, by the court, be set apart to him, in the manner prescribed in this article for setting apart other recorded homesteads.

NOTE.—Article 2, preceding, is *entirely new*, and is intended by the commission to provide for every conceivable difficulty arising in the partition of homestead property.

The statute of 1870, p. 793, the last enacted on the subject, will be found, on careful examination, to be rather cumbersome, and probably obnoxious to a constitutional objection as to jurisdiction. We do not decide that the probate court may not exercise the character of jurisdiction

intended by the act of 1870, to be conferred, for it is provided that the court may make partition and distribution of estates ; but does not this refer to partition among the heirs alone, and not partition where the decedent and a stranger to the estate hold as tenants in common, joint tenants or coparceners? This matter of partition of the homestead is frequently the most important matter in the settlement of an estate, and all things considered, it is obviously to the interest of all concerned, that it be made by judges of experience and learning, who, without reflecting upon our county judges in any manner, we may venture to say are to be found on the district rather than the county bench. If, however, partition can be satisfactorily made by the probate court, our method provides sufficient means for its accomplishment, and by a much less expensive and speedy method, through one set of appraisers. There are other departures from the text which are considered improvements thereon. Why should not the homestead of an unmarried decedent descend to the person who, by residing with, confers on him the right to a homestead? The homestead is for the dependent and not the decedent.

With this view the last section is added. This article has received favorable comment from probate judges.

CHAPTER VI.

OF CLAIMS AGAINST THE ESTATE.

SECTION 1491. Notice to creditors. Additional notice.

1492. Copy and proof of notice to be filed and order made.

1493. Time within which claims against an estate must be presented.

1494. Claims to be sworn to, and when allowed, to bear same interest as judgments.

1495. Probate judge may present claim, and action thereon.

1496. Allowance and rejection of claims.

1497. Approved claims or copies to be filed. Claims secured by liens may be described. Lost claims.

1498. Rejected claims to be sued for within three months.

1499. Claims barred by statute of limitations. When and who probate judge may examine.

1500. Claims must be presented before suit.

1501. Time of limitation.

1502. Claims in action pending at time of decease.

1503. Allowance of claim in part.

1504. Effect of judgment against executor.

1505. Execution not to issue after death. If one is levied the property may be sold.

1506. What judgment is not a lien on real property of estate.

1507. May refer doubtful claims. Effect of referee's allowance or rejection.

SECTION 1508. Trial by referee, how confirmed and its effect.

1509. Liability of executor, etc., for costs.

1510. Claims of executor, etc., against estate.

1511. Executor neglecting to give notice to creditors, to be removed.

1512. Executor to return statement of claims.

Notice to
creditors.

SEC. 1491. (§ 128.) Every executor or administrator must, immediately after his appointment, cause to be published in some newspaper of the county, if there be one, if not, then in such newspaper as may be designated by the court, a notice to the creditors of the decedent, requiring all persons having claims against him to exhibit them, with the necessary vouchers, within ten, or if the estate does not exceed three thousand dollars in value, within four months after the first publication of the notice, to the executor or administrator, at the place of his residence or business, to be specified in the notice; such notice must be published as often as the judge or court shall direct, but not less than once a week for four weeks; the court or judge may also direct additional notice by publication or posting. In case such executor or administrator resigns, or is removed, before the expiration of the ten months, or, if the estate does not exceed three thousand dollars value, before the expiration of four months, after the first publication of such notice, his successor must give notice only for the unexpired time allowed for administration.

Additional
notice.

Statutes of 1851, p. 464, §§ 126-8; 1861, p. 636, § 38.

Copy and
proof of no-
tice to be
filed and
order made.

SEC. 1492. (§ 129.) After the notice is given, as required by the preceding section, a copy thereof, with the affidavit of due publication, or of publication and posting, must be filed, and upon such affidavit or other testimony to the satisfaction of the court, an order or decree showing that due notice to creditors has been given, and directing that such order or decree be entered in the minutes and recorded, must be made by the court.

Statutes of 1851, p. 464, § 129; 1861, p. 636, § 39.

Time within
which claims
against an
estate must
be presented

SEC. 1493. (§ 130.) If a claim is not presented within ten, or, if the estate does not exceed three thousand dollars in value, within four months after the first publication of the notice, it is barred forever, except as follows: If it is not then due, or if it is contingent, it may be presented within ten months after it becomes due or absolute; when

it is made to appear by the affidavit of the claimant, to the satisfaction of the executor or administrator and the probate judge, that the claimant had no notice, as provided in this chapter, by reason of being out of the state, it may be presented any time before a decree of distribution is entered; also, a claim for a deficiency remaining unpaid after a sale of property of the estate mortgaged or pledged, may be presented at any time within ten months after such deficiency is ascertained.

Statutes of 1851, p. 464, § 130; 1860, p. 17, § 1.

SEC. 1494. (§ 131.) Every claim presented to the administrator must be supported by the affidavit of the claimant, or some one in his behalf, that the amount is justly due, that no payments have been made thereon which are not credited and that there are no offsets to the same, to the knowledge of the claimant or affiant. When the affidavit is made by another person than the claimant, he must set forth in the affidavit the reasons why it is not made by the claimant. The oath may be taken before any officer authorized to administer oaths. The executor or administrator may also require satisfactory vouchers or proofs to be produced in support of the claims. No greater rate of interest shall be allowed upon any claim, after the first publication of notice to creditors, than is allowed on judgments obtained in the district court.

Claims to be sworn to, and when allowed, to bear same interest as judgments.

Statutes of 1851, p. 464, § 131; 1860, pp. 17, 18, § 2; 1861, p. 637, § 40.

NOTE.—The amendment to this section places allowed claims against an estate on the same footing, so far as interest is concerned, as judgments, which is considered eminently just. For why should an allowed claim, which is a quasi judgment against a decedent, bear a greater rate of interest than a judgment against a living person?

SEC. 1495. (§ 131.) Any probate judge may present a claim against the estate of a decedent, for allowance, to the executor or administrator thereof; and if the executor or administrator allows the claim, he must, in writing, designate some probate judge of an adjoining county, who, upon the presentation of such claim to him, is vested with the same power to allow or reject it as he would have if the will had been proved or administration granted in his own county; and the probate judge presenting such

Probate judge may present claim, and action thereon.

claim, in case of its rejection by the executor or administrator, or by such probate judge as shall have acted upon it, has the same right to sue in a proper court for its recovery as other persons have when their claims against an estate are rejected.

Belknap, § 131, A; Statutes of 1856, pp. 93-4, § 1.

Allowance
and rejection
of claims.

SEC. 1496. (§ 132.) When a claim, accompanied by the affidavit required in this chapter, is presented to the executor or administrator, he must indorse thereon his allowance or rejection, with the day and date thereof. If he allow the claim, it must be presented to the probate judge for his approval, who must, in the same manner, indorse upon it his allowance or rejection. If the executor or administrator, or the judge, refuse or neglect to indorse such allowance or rejection for ten days after the claim has been presented to him, such refusal or neglect is equivalent to a rejection; and if the presentation be made by a notary, the certificate of such notary, under seal, is prima facie evidence of such presentation and rejection. If the claim be presented to the executor or administrator before the expiration of the time limited for the presentation of claims, the same is valid, though acted upon by the executor or administrator, and by the judge, after the expiration of such time.

Statutes of 1851, p. 464, § 132; 1861, pp. 637-8, § 41.

Approved
claims or
copies to be
filed.

Claims se-
cured by
liens may be
described.

SEC. 1497. (§ 133.) Every claim indorsed allowed by the executor or administrator, and approved by the probate judge, or a certified copy thereof, as hereinafter provided, must within thirty days thereafter be filed in the probate court, and be ranked among the acknowledged debts of the estate, to be paid in due course of administration. If the claim is founded on a bond, bill, note or other instrument, the original instrument must be presented, and the allowance and approval, or rejection, indorsed thereon or be attached thereto; if the claim or any part thereof is secured by a mortgage or other lien, such mortgage or other evidence of lien must be attached to the claim, unless the same is recorded in the office of the recorder of the county in which the land lies, in which case it is sufficient to describe the mortgage or lien, and refer to the date, volume and page of its record; and in all cases the claimant may withdraw his claim from the

executor or administrator immediately after indorsing his allowance thereon; or from the files, on leaving with such executor or administrator, or on file, a certified copy thereof, with a receipt for the original instrument indorsed thereon by himself or his agent. A brief description of every claim filed must be entered by the clerk in the register, showing the name of the claimant, the amount and character of the claim, rate of interest and date of allowance. If the original instrument is lost or destroyed, then in lieu thereof the claimant is required to file his affidavit, particularly describing such instrument, and stating the loss or destruction thereof, upon which affidavit the indorsement hereinbefore mentioned must be made.

Lost claims.

Statutes of 1851, p. 465, § 133; 1861, p. 638, § 42.

NOTE.—Some changes have been made in this section, so as to obviate the necessity of a claimant parting with the possession of any written evidence of his demand, when endeavoring to collect it.

SEC. 1498. (§ 134.) When a claim is rejected, either by the executor or administrator, or the probate judge, the holder must bring suit in the proper court against the executor or administrator, within three months after the date of its rejection, if it be then due, or within three months after it becomes due, otherwise the claim is forever barred.

Rejected claims to be sued for within three months.

Statutes of 1851, p. 465, § 134.

SEC. 1499. (§ 135.) No claim shall be allowed by the executor or administrator, or by the probate judge, which is barred by the statute of limitations. When a claim is presented to the probate judge for his allowance, he may, in his discretion, examine the claimant and others, on oath, and hear any other legal evidence touching the validity of the claim.

Claims barred by statute of limitations. When and who probate judge may examine.

Statutes of 1851, p. 465, § 135.

SEC. 1500. (§ 136.) No holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator.

Claims must be presented before suit.

Statutes of 1851, p. 465, § 136.

SEC. 1501. (§ 137.) The time during which there shall

Time of limitation.

be a vacancy in the administration must not be included in any limitations herein prescribed.

Statutes of 1851, p. 465, § 137.

Claims in action pending at time of decease.

SEC. 1502. (§ 138.) If an action is pending against the decedent at the time of his death, the plaintiff must in like manner present his claim to the executor or administrator for allowance or rejection, authenticated as required in other cases; and no recovery shall be had in the action unless proof be made of the presentations required.

Statutes of 1851, p. 465, § 138.

Allowance of claim in part

SEC. 1503. (§ 139) Whenever any claim is presented to an executor or administrator, or to the probate judge, and he is willing to allow the same in part, he must state in his indorsement the amount he is willing to allow. If the creditor refuse to accept the amount allowed in satisfaction of his claim, he shall recover no costs in any action therefor, brought against the executor or administrator, unless he recovers a greater amount than that offered to be allowed.

Statutes of 1851, p. 465, § 139.

Effect of judgment against executor.

SEC. 1504. (§ 140.) A judgment rendered against an executor or administrator, upon any claim for money against the estate of his testator or intestate, only establishes the claim in the same manner as if it had been allowed by the executor or administrator and the probate judge, and the judgment must be that the executor or administrator pay in due course of administration the amount ascertained to be due. A certified transcript of the judgment must be filed in the probate court. No execution must issue upon such judgment, nor shall it create any lien upon the property of the estate or give to the judgment creditor any priority of payment.

Statutes of 1851, p. 465, § 140.

Execution not to issue after death.

SEC. 1505. (§ 141.) When any judgment has been rendered against the testator or intestate in his lifetime, no execution shall issue thereon after his death, except in the cases hereinafter provided, but a certified copy of the judgment must be presented to the executor or administrator, and be allowed and filed, or rejected, as any

other claim, but need not be supported by the affidavit of the claimant or other proof, except to the fact that the amount claimed thereon is justly due and unsatisfied, and must be paid in due course of administration. If execution is actually levied upon any property of the decedent before his death, the same may be sold for the satisfaction thereof, and the officer making the sale must account to the executor or administrator for any surplus in his hands. Execution may, however, issue on application of the executor or administrator, or the successor in interest of the decedent, by order of the court; or in any case of a judgment against a decedent for the recovery of real or personal property, and in either case must be enforced in the same manner and with like effect as if the decedent were living.

If one is levied, the property may be sold.

Statutes of 1851, p. 465, § 141; 1861, p. 638, § 43; 1864, p. 452, § 1.

NOTE.—This section has been made to conform to the provisions of this code, in section 686.

SEC. 1506. A judgment rendered against a decedent, dying after verdict or decision on an issue of fact, but before judgment is rendered thereon, is not a lien on the real property of the decedent, but is payable in due course of administration.

What judgment is not a lien on real property of estate.
N. S.

NOTE.—This section is drawn from the statutes of 1851, p. 82, § 202.

SEC. 1507. (§ 142.) If the executor or administrator doubts the correctness of any claim presented to him, he may enter into an agreement, in writing, with the claimant, to refer the matter in controversy to some disinterested person to be approved by the probate judge. Upon filing the agreement and approval of the probate judge in the office of the clerk of the district court for the county in which the letters testamentary or of administration were granted, the clerk must, either in vacation or in term, enter a minute of the order referring the matter in controversy to the person so selected; or, if the parties consent, a reference may be had in the probate court; and the report of the referee, if confirmed, establishes or rejects the claim the same as if it had been allowed or rejected by the executor or administrator and the probate judge.

May refer doubtful claims.

Effect of referee's allowance or rejection

Statutes of 1851, p. 466, § 142; 1861, p. 638, § 44.

Trial by
referee, how
confirmed,
and its effect

Sec. 1508. (§ 143.) The referee must hear and determine the matter, and make his report thereon to the court in which his appointment is entered. The same proceedings shall be had in all respects, and the referee shall have the same powers, be entitled to the same compensation and subject to the same control, as in other cases of reference. The court may remove the referee, appoint another in his place, set aside or confirm his report, and adjudge costs, as in actions against executors or administrators, and the judgment of the court thereon shall be as valid and effectual, in all respects, as if the same had been rendered in a suit commenced by ordinary process.

Statutes of 1851, p. 466, § 143; 1861, p. 639, § 45.

Liability of
executor,
etc., for costs

Sec. 1509. (§ 144.) When a judgment is recovered, with costs, against any executor or administrator, he shall be individually liable therefor, but they must be allowed him in his administration accounts, unless it appears that the suit or proceeding in which the costs were taxed was prosecuted or defended without just cause.

Statutes of 1851, p. 466, § 144.

Claims of
executor,
etc., against
estate.

Sec. 1510. (§ 145.) If the executor or administrator is a creditor of the decedent, his claim, duly authenticated by affidavits, must be presented for allowance or rejection to the probate judge, and its allowance by the judge is sufficient evidence of its correctness, and it must be paid as other claims, in due course of administration.

Statutes of 1851, p. 466, § 145.

Executor
neglecting to
give notice to
creditors, to
be removed.

Sec. 1511. (§ 146.) If an executor or administrator shall neglect for two months after his appointment to give notice to creditors, as prescribed by this chapter, the court must revoke his letters, and appoint some other person in his stead, equally or the next in order entitled to the appointment.

Statutes of 1851, p. 466, § 146.

Executor
to return
statement
of claims.

Sec. 1512. (§ 147.) At the same term at which he is required to return his inventory, the executor or administrator must also return a statement of all claims against the estate which have been presented to him, if so required by the court; and from term to term thereafter he must present a statement of claims subsequently pre-

sented to him. In all such statements he must designate the names of the creditors, the nature of each claim, when it became due or will become due, and whether it was allowed or rejected by him.

Statutes of 1851, p. 466, § 147.

CHAPTER VII.

OF SALES AND CONVEYANCES OF PROPERTY OF DECEDENTS.

ARTICLE I. SALES IN GENERAL.

II. SALES OF PERSONAL PROPERTY.

III. SUMMARY SALES OF MINES AND MINING INTERESTS.

IV. SALES OF REAL ESTATE, INTERESTS THEREIN AND CONFIRMATION THEREOF.

ARTICLE I.

SALES IN GENERAL.

SECTION 1517. No sales valid except by order of probate court.

1518. Applications for orders of sale.

1519. But one petition, order and sale must be had when it is possible to do so.

Sec. 1517. (§ 148.) No sale of any property of an estate of a decedent is valid, unless made under order of the probate court, except as otherwise provided in this chapter. All sales must be, under oath, reported to and confirmed by the probate court, before the title to the property sold passes.

No sales valid except by order of probate court.

Statutes 1851, p. 467, § 148; 1861, p. 639, § 46.

NOTE.—This section is amended so as to require "all sales" to be confirmed before title to property passes, and obviates the repetition of this provision.

Sec. 1518. (§ 149.) All petitions for orders of sale must be in writing, setting forth the facts showing the sale to be necessary, and upon the hearing any person interested in the estate may file his written objections, which must be heard and determined.

Applications for orders of sale.

Statutes of 1851, p. 467, § 149.

But one petition, order and sale must be had when it is possible to do so.
N.

SEC. 1519. When it can be made to appear to the court that the estate is insolvent, or that it will require a sale of all the property of the estate, of every character, to pay the family allowance, expenses of administration and debts, there must be but one petition filed, but one order of sale made and but one sale had. The probate court, when a petition for the sale of any property for any of the purposes herein named is presented, must inquire fully into the probable amount required to make all such payments, and if there is no more estate than sufficient to pay the same, must require but one proceeding for the sale of the entire estate. In such case, the petition must set forth all the facts required by section fifteen hundred and thirty-seven.

ARTICLE II.

SALES OF PERSONAL PROPERTY.

SECTION 1522. Perishable and depreciating property to be sold.

1523. Order to sell personal property.

1524. Partnership interests and choses in action, how sold.

1525. Order of sale, what to direct and what to be first sold.

1526. Sale of personal property.

Perishable and depreciating property to be sold.

SEC. 1522 (§ 150.) At any time after receiving letters, the executor, administrator or special administrator may apply to the court or judge and obtain an order to sell perishable and other personal property likely to depreciate in value, or which will incur loss or expense by being kept, and so much other personal property as may be necessary to pay the allowance made to the family of the decedent. The order for the sale may be made without notice; but the executor, administrator or special administrator is responsible for the property, unless, after making a sworn return and on a proper showing, the court shall approve the sale.

Statutes of 1851, p. 467, § 150; 1861, p. 639, § 47; 1865-6, pp. 765-6.

Order to sell personal property.

SEC. 1523. (§ 150.) If claims against the estate have been allowed, and a sale of property is necessary for their payment or the expenses of administration, the executor or administrator may apply for an order to sell so much

of the personal property as may be necessary therefor. Upon filing his petition, notice of at least five days must be given of the hearing of the application, either by posting notices or by advertising. He may also make a similar application, either in vacation or term, from time to time, so long as any personal property remains in his hands and sale thereof is necessary. If it is made to appear for the best interest of the estate, he may, at any time after filing the inventory, in like manner and after giving like notice, apply for and obtain an order to sell the whole of the personal property belonging to the estate, whether necessary to pay debts or not.

Statutes of 1851, p. 467, § 150 ; 1861, p. 639, § 47 ; 1865-6, pp. 765-6, § 4.

Sec. 1524. Partnership interests or interests belonging to any estate by virtue of any partnership formerly existing, and choses in action, may be sold in the same manner as other personal property, when it appears to be for the best interest of the estate. Before confirming the sale of any partnership interest, whether made to the surviving partner or to any other person, the court or judge must carefully inquire into the condition of the partnership affairs, and must examine the surviving partner, if in the county and able to be present in court.

Partnership interests and choses in action, how sold.

Statutes of 1865-6, pp. 765-6, § 4.

Sec. 1525. (§ 151.) If it appears that a sale is necessary for the payment of debts or family allowance; or for the best interest of the estate and the persons interested in the property to be sold, whether it is or is not necessary to pay the debts or family allowance; the court or judge must order it to be made. In making orders and sales for the payment of debts or family allowance, the court or judge must so direct, and such articles as are not necessary for the support and subsistence of the family of the decedent, or are not specially bequeathed, must be first sold. Articles bequeathed must not be sold to pay debts or family allowance, until all other personal estate has been applied to the payment thereof.

Order of sale, what to direct, and what to be first sold.

Statutes of 1851, p. 467, § 151 ; 1861, pp. 639-40, § 48.

Sec. 1526. (§§ 152, 153.) The sale of personal property must be made at public auction, and after public notice,

Sale of personal property.

given for at least ten days, by notices posted in three public places in the county, or by publication in a newspaper, or both, containing the time and place of sale and a brief description of the property to be sold; unless, for good reason shown, the probate court or judge orders a private sale, or a shorter notice. Public sales of such property must be made at the court-house door, at the residence of the decedent, or at some other public place, but no sale shall be made of any property which is not present at the time of selling it, unless the court otherwise order.

Statutes of 1851, p. 467, §§ 152-3; 1861, p. 640, §§ 49, 50.

NOTE.—By section 1517, being the first section of this chapter, it is provided that “*all sales*” must be confirmed before title passes; hence, in this section this provision is omitted and will be omitted wherever it occurs elsewhere.

ARTICLE III.

SUMMARY SALES OF MINES AND MINING INTERESTS.

SECTION 1529. Mines may be sold, how.

1530. Petition for sale, who may file and what to contain.

1531. Order to show cause, how made and on what notice.

1532. Order of sale, when and how made.

1533. Further proceedings to conform to articles two and four.

Mines may
be sold, how.

SEC. 1529. When it appears from the inventory of the estate of any decedent that his estate consists in whole or in part of mines or interests in mines, or of shares, interests or stocks in a mining corporation, such mines, interests, stocks or shares may be sold under the order of the probate court having jurisdiction of the estate, as hereinafter provided.

Statutes of 1865-6, p. 359, § 1.

Petition for
sale, who
may file and
what to con-
tain.

SEC. 1530. (§ 153.) The executor, administrator, or any heir at law, of the estate, any creditor of the estate, any partner or member of any mining company, or the president of any mining corporation, in which interests, stock or shares are held or owned by the estate, may file in the probate court a petition in writing, setting forth the general facts of the estate being then in due course of administration, and particularly describing the mine, interest, stock or shares which it is desired to sell, and partic-

ularly the condition and situation of the mines, mining interests, or of the mining company or corporation in which such interests or shares are held, and the grounds upon which the sale is asked to be made.

Statutes of 1865-6, p. 539, § 2.

Sec. 1531. (§ 153.) Upon the presentation of such petition the probate judge must make an order directing all persons interested to appear before him at a time and place specified, not less than four nor more than ten weeks from the time of making such order, to show cause why an order should not be granted to the executor or administrator to sell such mines, mining interests, shares or stocks, as are set forth in the petition and belonging to the estate. A copy of the order to show cause must be personally served on all persons interested in the estate, at least ten days before the time appointed for hearing the petition, or published at least four successive weeks in such newspaper as the court shall specify. If all persons interested in the estate signify in writing their assent to such sale, the notice may be dispensed with.

Order to show cause, how made and on what notice.

Statutes of 1865-6, p. 359, § 2.

Sec. 1532. (§ 153.) If, upon hearing the petition, it appears to the satisfaction of the probate judge that it is to the interest of the estate that such mining property or interests of the estate should be sold, or if it appears to his satisfaction that an immediate sale is necessary in order to secure the just rights or interests of the mining partners, tenants in common, or mining corporations in which such shares, stocks or property are held, such probate judge must make an order authorizing the executor or administrator to sell such mining interests, mines, stocks or shares, as hereinafter provided.

Order of sale, when and how made.

Statutes of 1865-6, p. 359, § 4.

Sec. 1533. (§ 153.) After the order of sale is made all farther proceedings for the sale of such mining property, and for the notice, report and confirmation thereof, must be in conformity with the provisions of article four of this chapter. And whenever such mining interests consists of stocks or shares, held and owned as personalty, the proceedings for the sale thereof, after the order of sale,

Further proceedings to conform to articles 2 and 4.

must be in conformity with the provisions of article two of this chapter.

Statutes of 1865-6, p. 359, § 5.

ARTICLE IV.

THE SALE OF REAL ESTATE, INTERESTS THEREIN AND CONFIRMATION THEREOF.

SECTION 1536. To sell real estate, when.

1537. Verified petition for sale, what to contain and to what it may refer.

1538. Order to persons interested to appear.

1539. Copy to be served, assent given, or publication made.

1540. Hearing after proof of service. Presentation of claims.

1541. Administrator, executor and witnesses may be examined.

1542. To sell real estate or any part, when.

1543. Order of sale, when to be made.

1544. What the order of sale must contain. May be at public or private sale.

1545. Interested persons may apply for order of sale. Form of petition.

1546. To deliver copy of order to executor.

1547. Notice of sale.

1548. Time and place.

1549. Private sale of real estate, how made, and notice. Bids, when and how received.

1550. Ninety per cent. of appraised value must be offered.

1551. Purchase money on sale on credit, how secured.

1552. Hearing and setting aside sale, and when re-sale may be ordered.

1553. May file objections, when and who.

1554. When order of confirmation is to be made and when not.

1555. Conveyances.

1556. Order of confirmation, what to state.

1557. Sale may be postponed.

1558. Notice of postponement.

1559. Sale of real estate to pay legacies.

1560. Where payment of debts, etc., provided for by will.

1561. Sale without order. May require security.

1562. Where provision by will insufficient.

1563. Estate subject to debts, etc.

1564. Contribution among legatees.

1565. Contract for purchase of lands may be sold, how.

1566. Conditions of sale.

1567. Purchaser to give bond.

1568. Executor to assign contract.

1569. Sales by executors or administrators of lands under mortgage or lien.

1570. The holder of the mortgage or lien may purchase the lands. His receipt to the amount of his claim a valid payment.

SECTION 1571. Administrator and executor liable for misconduct in sale.

1572. Fraudulent sales.

1573. Limitation of actions for vacating sale, etc.

1574. To what cases preceding section not to apply.

1575. Account of sale to be returned.

1576. Executor, etc., not to be purchaser.

SEC. 1536. (§ 154.) When the personal estate in the hands of the executor or administrator is exhausted or insufficient to pay the allowance of the family, the debts outstanding against the decedent, and the debts, expenses and charges of administration, the executor or administrator may sell the real estate for that purpose, upon the order of the probate court.

To sell real estate, when.

Statutes of 1851, p. 467, § 154; 1861, p. 640, § 51.

SEC. 1537. (§ 155.) To obtain such order, he must present a verified petition to the probate court, or to the judge at chambers, setting forth the amount of personal estate that has come to his hands, and how much thereof, if any, remains undisposed of; the debts outstanding against the decedent, as far as can be ascertained or estimated; the amount due upon the family allowance, or that will be due after the same has been in force for one year; the debts, expenses and charges of administration already accrued, and an estimate of what will, or may accrue during the administration; a description of all the real estate of which the decedent died seized or in which he had any interest, or has acquired any interest, and the condition and value of the respective portions and lots, and whether the same be community or separate property; the names and ages of the devisees, if any, and of the heirs of the decedent. If the inventory and appraisal on file contain a full description of all the personal and real estate of which the decedent died seized or in which he had any interest, or in which the estate has acquired any interest, such inventory, by a proper reference, may be made a part of the petition for a description of the property of the estate; if the same be full as to all property, except property subsequently discovered or received, such reference may be had to the inventory, and the additional property may be set forth in the petition. If all the matters above enumerated cannot be ascertained, it must be so stated in the petition.

Verified petition for sale, what to contain and to what it may refer.

Statutes of 1851, p. 467, § 155; 1861, p. 640, § 52.

Order to
persons
interested
to appear.

Sec. 1538. (§ 156.) If it appears to the court or judge, from such petition, that it is necessary to sell the whole or some portion of the real estate for the purposes and reasons mentioned in the preceding section, or any of them, such petition must be filed and an order thereupon made, directing all persons interested in the estate to appear before the court, at a time and place specified, not less than four nor more than ten weeks from the time of making such order, to show cause why an order should not be granted to the executor or administrator to sell so much of the real estate of the decedent as is necessary.

Statutes of 1851, p. 468, § 156 ; 1861, p. 640, § 53.

Copy to be
served, as-
sent given,
or publica-
tion made.

Sec. 1539. (§§ 157, 159.) A copy of each order to show cause must be personally served on all persons interested in the estate and on any general guardian of any minor, devisee or heir of the decedent resident in the county, at least ten days before the time appointed for hearing the petition, or must be published at least four successive weeks, in such newspaper as the court or judge shall direct. The notice is served if the publication is completed ten days before the day set for hearing. If all persons interested in the estate join in the petition for the sale, or signify in writing their assent thereto, the notice may be dispensed with.

Statutes of 1851, p. 468, §§ 157, 159 ; 1861, p. 640, §§ 54, 56 ; 1863-4, p. 367, § 23 ; *Townsend vs. Tallant*, 33 Cal. 45 ; see (§ 292) post art. 6, § 18, of the constitution.

NOTE.—Two sections are here united, being on the same subject. The latter clause of section 159 is omitted, for the reason that in a subsequent chapter one section provides for appointment of attorneys in all necessary cases. The provisions of section 23 (Stat. 1863-4, p. 367), are embraced in this section.

Hearing
after proof
of service.

Sec. 1540. (§ 158.) The probate court, at the time and place appointed in such order, or at such other time to which the hearing may be postponed, upon satisfactory proof of personal service or publication of a copy of the order, by affidavit or otherwise, if the consent, in writing, to such sale of all parties interested is not filed, must proceed to hear the petition, and hear and examine the allegations and proofs of the petitioners, and of all persons interested in the estate who may oppose the applica-

tion. All claims against the decedent not before presented, if the period of presentation has not elapsed, may be presented and passed upon at the hearing, and, if approved by the executor or administrator and the probate judge, are not subject to review, except on appeal.

Presentation
of claims.

Statutes of 1851, p. 468, § 158 ; 1861, p. 640, § 55.

Sec. 1541. (§ 160.) The executor, administrator and witnesses may be examined on oath by either party, and process to compel them to attend and testify may be issued by the probate judge, in the same manner and with like effect as in other cases.

Administra-
tor, executor
and witness-
es may be
examined.

Statutes of 1851, p. 468, § 160.

Sec. 1542. (§ 161.) If it appears necessary to sell a part of the real estate, and that by a sale thereof the residue of the estate, real or personal, or some specific part thereof, would be greatly injured or diminished in value, or subjected to expense, or rendered unprofitable, or that after any such sale the residue would be so small in quantity or value, or would be of such a character with reference to its future disposition among the heirs or devisees, as clearly to render it for the best interest of all concerned that the same should be sold, the court may authorize the sale of the whole estate or of any part thereof necessary and for the best interest of all concerned. The court may confirm the sale of the whole estate or of a specific part thereof. The necessity or expediency of the sale, as defined in this section, must be set forth in the return of sale, and established on the hearing. The sale so confirmed is valid.

To sell real
estate or any
part, when.

Statutes of 1851, p. 468, § 161 ; 1861, p. 642, § 57 ; 1865-6,
p. 766, § 5.

Sec. 1543 (§ 162.) If the court is satisfied, after a full hearing upon the petition and an examination of the proofs and allegations of the parties interested, that a sale of the whole or some portion of the real estate is necessary, for any of the causes mentioned in this article, or if such sale be assented to by all the persons interested, an order must be made to sell the whole, or so much and such parts of the real estate described in the petition, as the court shall judge necessary or beneficial.

Order of sale,
when to be
made.

Statutes of 1851, p. 468, § 162 ; 1861, p. 642, § 58.

What the
order of sale
must contain

SEC. 1544. (§ 163.) The order of sale must describe the lands to be sold and the terms of sale, which may be for cash, or on a credit not exceeding one year, payable in gross or instalments, and in such kind of money, with interest, as the court may direct. The land may be sold in one parcel or in subdivisions, as the executor or administrator shall judge most beneficial to the estate, unless the court otherwise specially directs. If it appears that any part of such real estate has been devised and not charged in such devise with the payment of debts or legacies, the court shall order that part descended to heirs to be sold before that so devised. Every such sale must be ordered to be and made at public auction, unless, in the opinion of the court, it would benefit the estate to sell the whole or some part of such real estate at private sale; the court may, if the same is asked for in the petition, order or direct such real estate or any part thereof, to be sold at either public or private sale, as the executor or administrator shall judge to be most beneficial for the estate. If the executor or administrator neglects or refuses to make a sale under the order and as directed therein, he may be compelled to sell, by order of the court, made on motion, after due notice, by any party interested.

May be at
public or
private sale.

Statutes of 1851, p. 469, § 163 ; 1861, p. 642, § 59.

Interested
persons may
apply for
order of sale.

SEC. 1545. (§ 164.) If the executor or administrator neglects to apply for an order of sale when it is necessary, any person interested in the estate may make application therefor, in the same manner as the executor or administrator, and notice thereof must be given to the executor or administrator, before the hearing. The petition of such applicant must contain as many of the matters set forth in section fifteen hundred and thirty-seven as he can ascertain, and the decree of sale must fix the period of time within which the executor or administrator must make the sale.

Form of
petition.

Statutes of 1851, p. 469, § 164 ; 1861, p. 642, § 60.

To deliver
copy of order
to executor.

SEC. 1546. (§ 165.) Upon making the order mentioned in the last section, a certified copy of the order of sale must be delivered by the court or the clerk to the

executor or administrator, who is thereupon authorized and required to sell the real estate as directed.

Statutes of 1851, p. 469, § 165; 1861, p. 643, § 61.

SEC. 1547. (§ 166.) When a sale is ordered, and is to be made at public auction, notice of the time and place of sale must be posted up in three of the most public places in the county in which the land is situated, and published in a newspaper, if there be one printed in the same county, but if none, then in such paper as the court may direct, for three weeks successively next before the sale; the lands and tenements to be sold must be described with common certainty in the notice.

Notice of
sale.

Statutes of 1851, p. 469, § 166; 1865-6, p. 766, § 6.

SEC. 1548. (§ 167.) Sales at public auction must be made in the county where the land is situated, but when the land is situated in two or more counties it may be sold in either. The sale must be made between the hours of nine o'clock in the morning and the setting of the sun on the same day, and must be made on the day named in the notice of sale, unless the same is postponed.

Time and
place.

Statutes of 1851, p. 469, § 167; 1861, p. 643, § 62; 1864, p. 370, § 13; 1865-6, p. 766, § 7.

SEC. 1549. (§ 167.) When a sale of real estate is ordered to be made at private sale, notice of the same must be posted up in three of the most public places in the county in which the land is situated, and published in a newspaper, if there be one printed in the same county—if none, then in such paper as the court may direct—for two weeks successively next before the day on or after which the sale is to be made, in which the lands and tenements to be sold must be described with common certainty. The notice must state a day on or after which the sale will be made, and a place where offers or bids will be received. The day last referred to must be at least fifteen days from the first publication of notice, and the sale must not be made before that day, but must be made within six months thereafter. The bids or offers must be in writing, and may be left at the place designated in the notice, or delivered to the executor or administrator personally, and filed in the office of the clerk of the probate court, to which the return of sale must be made, at

Private sale
of real estate,
how made,
and notice.

Bids, where
and how
received.

any time after the first publication of the notice and before the making of the sale. If it is shown that it will be for the best interest of the estate, the court or judge may, by an order, shorten the time of notice, which shall not, however, be less than one week, and may provide that the sale may be made on or after a day less than fifteen but not less than eight days from the first publication of the notice, in which case the notice of sale and the sale may be made to correspond with such order.

Statutes of 1865-6, p. 766, § 8.

Ninety per cent. of appraised value must be offered.

SEC. 1550. (§ 167) No sale of real estate at private sale shall be confirmed by the court, unless the sum offered is at least ninety per cent. of the appraised value thereof, nor unless such real estate has been appraised within one year of the time of such sale. If it has not been so appraised, or if the court is satisfied that the appraisement is too high or too low, appraisers must be appointed, and they must make an appraisement thereof in the same manner as in case of an original appraisement of an estate. This may be done at any time before the sale or the confirmation thereof.

Statutes of 1865-6, p. 767, § 9.

Purchase money on credit sale, how secured.

SEC. 1551. (§ 168.) The executor or administrator must, when the sale is made upon a credit, take the notes of the purchaser for the purchase money, with a mortgage on the property to secure their payment.

Statutes of 1851, p. 469, § 168.

Hearing and setting aside sale, and when re-sale may be ordered.

SEC. 1552. (§ 169.) The executor or administrator, after making any sale of real estate, must make a return of his proceedings to the probate court, which must be filed in the office of the clerk, at any time subsequent to the sale, either in term or vacation. If the sale is made at public auction, and the return made and filed on or before the first day of the next term thereafter, no notice is required of such return or of the hearing thereof, but the hearing may be had upon the first day of the term, or any subsequent day to which the same may be postponed. If the sale be not made at public auction, or if made at public auction a hearing upon the return of proceedings be asked for in the return, or is brought on

for a hearing upon a day before the first day of the next term thereafter, or upon any other day than the first day of the next term after such sale, the court or judge must fix the day for the hearing, of which notice of at least ten days must be given by the clerk, by notices posted in three public places in the county, or by publication in a newspaper, or both, as the court or judge shall direct, and must briefly indicate the land sold, the sum for which it was sold, and must refer to the return for further particulars. Upon the hearing, the court must examine the return and witnesses in relation to the same, and if the proceedings were unfair, or the sum bid disproportionate to the value; and that a sum exceeding such bid at least ten per cent., exclusive of the expenses of a new sale, may be obtained, the court may vacate the sale and direct another to be had, of which notice must be given, and the sale in all respects conducted as if no previous sale had taken place; if an offer ten per cent. more in amount than that named in the return, be made to the court in writing, by a responsible person, it is in the discretion of the court to accept such offer and confirm the sale to such person, or to order a new sale.

Statutes of 1851, p. 469, § 159; 1861, p. 643, § 63;
1863-4, p. 370, § 14.

Sec. 1553. (§ 170.) When return of the sale is made and filed, any person interested in the estate may file written objections to the confirmation thereof, and may be heard thereon, when the return is heard by the court or judge, and may produce witnesses in support of his objections.

May file
objections,
when and
who.

Statutes of 1861, p. 644, § 64.

Sec. 1554. (§ 171.) If it appears to the court that the sale was legally made and fairly conducted, and that the sum bid was not disproportionate to the value of the property sold, and that a greater sum, as above specified, cannot be obtained, or if the advance bid mentioned in section fifteen hundred and fifty-two be made and accepted by the court, the court must make an order confirming the sale, and directing conveyances to be executed. The sale, from that time, is confirmed and valid, and a certified copy of the order confirming it and directing conveyances to be executed, must be recorded in the office of the

When order
of confirma-
tion is to be
made and
when no.

recorder of the county within which the land sold is situated. If, after the confirmation, the purchaser neglects or refuses to comply with the terms of sale, the court may, on motion of the executor or administrator, and after notice to the purchaser, order a re-sale to be made of the property. If the amount realized on such re-sale does not cover the bid and the expenses of the previous sale, such purchaser is liable for the deficiency to the estate.

Statutes of 1851, p. 470, § 171; 1856, p. 20, § 1; 1861, p. 644, § 65.

NOTE.—The recording of the order of sale is unnecessary and is omitted, since the confirming order is to be recorded.

Conveyances **SEC. 1555. (§ 172.)** Conveyances must thereupon be executed to the purchaser by the executor or administrator, and they must refer to the orders of the probate court authorizing and confirming the sale of the property of the estate, and directing conveyances thereof to be executed, and to the record of such orders in the office of the county recorder, either by the date of such recording, or by the date, volume and page of the record, and such reference shall have the same effect as if the orders were at large inserted in the conveyance. Conveyances so made convey all the right, title, interest and estate of the decedent, in the premises, at the time of his death; if, however, prior to the sale, by operation of law or otherwise, the estate has acquired any right, title or interest, in the premises, other than or in addition to that of the decedent at the time of his death, such right, title or interest also passes by such conveyances.

Statutes of 1851, p. 470, § 172; 1856, p. 20, § 2; 1861, p. 644, § 66.

Order of confirmation, what to state **SEC. 1556. (§ 173.)** Before any order is entered confirming the sale, it must be proved to the satisfaction of the court that notice was given of the sale as prescribed, and the order of confirmation must show that such proof was made.

Statutes of 1851, p. 470, § 173.

Sale may be postponed.

SEC. 1557. (§ 174.) If, at the time appointed for the sale, the executor or administrator deems it for the interest of all persons concerned therein that the same be

postponed, he may postpone it from time to time, not exceeding in all three months.

Statutes of 1851, p. 470, § 174.

Sec. 1558. (§ 175.) In case of a postponement, notice thereof must be given, by a public declaration, at the time and place first appointed for the sale, and if the postponement be for more than one day, further notice must be given, by posting notices in three or more public places in the county where the land is situated, or publishing the same, or both, as the time and circumstances will admit.

Notice of
postpone-
ment.

Statutes of 1851, p. 470, § 175; 1861, p. 614, § 67.

Sec. 1559. (§ 176) When a testator has given any legacy by will that is effectual to pass or change the title to real estate, and his goods, chattels, rights and credits are insufficient to pay the legacy, together with his debts and the charges of administration, the executor or administrator with the will annexed may obtain an order therefor, and sell his real estate for that purpose, in the same manner and upon the same terms and conditions as are prescribed in this chapter in case of a sale for the payment of debts.

Sale of real
estate to pay
legacies.

Statutes of 1851, p. 470, § 176.

Sec. 1560. (§ 177.) If the testator makes provision by his will, or designates the estate to be appropriated for the payment of his debts, the expenses of administration or family expenses, they must be paid according to such provision or designation, out of the estate thus appropriated, so far as the same is sufficient.

Where pay-
ment of
debts, etc.,
provided for
by will.

Statutes of 1851, p. 470, § 177.

Sec. 1561. (§ 178.) When such provision has been made, or any property directed by the will to be sold, the executor or administrator with the will annexed may sell without the order of the probate court, but he must give notice of the sale, return accounts thereof to the court, and make the sale in all respects as under order of the court, unless there are special directions in the will, in which case he must be governed thereby; but in all cases no sale is valid unless confirmed by the court, under the rules prescribed in cases of sales of real estate by an ad-

Sale without
order.

May require
security.

ministrator. Before granting such confirmation the court may require security, as in cases of sales of land by an administrator.

Statutes of 1851, p. 470, § 178; 1861, p. 645, § 68.

Where pro-
vision by will
is insufficient.

SEC. 1562. (§ 179.) If the provision made by the will, or the estate appropriated therefor, is insufficient to pay the debts, expenses of administration and family expenses, that portion of the estate not devised or disposed of by the will, if any, must be appropriated and disposed of for that purpose, according to the provisions of this chapter.

Statutes of 1851, p. 471, § 179.

Estate
subject to
debts, etc.

SEC. 1563. (§ 180.) The estate, real and personal, given by will to legatees or devisees, is liable for the debts, expenses of administration and family expenses, in proportion to the value or amount of the several devises or legacies, but specific devises or legacies are exempt from such liability if it appears to the court necessary to carry into effect the intention of the testator and there is other sufficient estate.

Statutes of 1851, p. 471, § 180.

Contribution
among
legatees.

SEC. 1564. (§ 181.) When an estate given by will has been sold for the payment of debts or expenses, all the devisees and legatees must contribute according to their respective interest to the devisee or legatee whose devise or legacy has been taken therefor, and the probate court, when distribution is made, must, by decree for that purpose, settle the amount of the several liabilities and decree the amount each person shall contribute, and reserve the same from their distributive shares respectively.

Statutes of 1851, p. 471, § 181.

Contract for
purchase of
lands may be
sold, how.

SEC. 1565. (§ 182.) If a decedent, at the time of his death, was possessed of a contract for the purchase of lands, his interest in such land and under such contracts may be sold on the application of his executor or administrator, in the same manner as if he had died seized of such land, and the same proceedings may be had for that purpose as are prescribed in this chapter for the sale of lands of which he died seized, except as hereinafter provided.

Statutes of 1851, p. 471, § 182.

SEC. 1566. (§ 183.) The sale must be made subject to all payments that may thereafter become due on such contracts, and if there are any such, the sale must not be confirmed by the probate judge until the purchasers execute a bond to the executor or administrator, for the benefit and indemnity of himself and of the persons entitled to the interest of the decedent in the lands so contracted for, in double the whole amount of payments thereafter to become due on such contract, with such sureties as the probate judge shall approve.

Conditions
of sale.

Statutes of 1851, p. 471, § 183.

SEC. 1567. (§ 184.) The bond must be conditioned that the purchaser will make all payments for such land that become due after the date of the sale, and will fully indemnify the executor or administrator and the persons so entitled, against all demands, costs, charges and expenses, by reason of any covenant or agreement contained in such contract.

Purchaser to
give bond.

Statutes of 1851, p. 471, § 184.

NOTE.—The last clause of the original section is omitted, being provided for in preceding section.

SEC. 1568. (§ 185.) Upon the confirmation of the sale, the executor or administrator must execute to the purchaser an assignment of the contract, which vests in the purchaser, his heirs and assigns, all the right, title and interest of the estate, or of the persons entitled to the interest of the decedent, in the lands sold at the time of the sale, and the purchaser has the same rights and remedies against the vendor of such land as the decedent would have had if he were living.

Executor to
assign con-
tract.

Statutes of 1851, p. 471, § 185.

SEC. 1569. (§ 186.) When any sale is made by an executor or administrator, pursuant to the provisions of this chapter, of lands subject to any mortgage or other lien, which is a valid claim against the estate of the decedent, the purchase money must be applied, after paying the necessary expenses of the sale, first to the payment and satisfaction of the mortgage or lien, and the residue, if any, in due course of administration; the application of the purchase money to the satisfaction of the mortgage

Sales by
executors
or adminis-
trators of
lands under
mortgage
or lien.

Satisfaction
of liens and
disposition
of purchase
money.

or lien must be made without delay, and the land is subject to such mortgage or lien until the purchase money has been actually so applied. If, however, it is shown to be necessary, the court may direct that sufficient of such purchase money be retained to meet such portion of the family allowance and charges and expenses of administration as may properly be required from the holder thereof, unless such mortgage or lien is given by, or held against, the decedent, for the purchase of the land or the erection of improvements thereon by him; such reservation of a portion of the purchase money shall not prevent the discharge of the mortgage or lien; and no lien against any estate is affected by the statute of limitations, pending the proceedings for the settlement of the estate. The purchase money, or so much thereof as may be sufficient to pay such mortgage or lien, with interest, and any lawful costs and charges thereon, may be paid into the probate court, to be received by the clerk thereof, whereupon the mortgage or lien upon the land must cease, and the purchase money paid over by the clerk of the court without delay, in payment of the expenses of the sale and in satisfaction of the debt to secure which the mortgage or other lien was taken, and the balance, if any, at once returned to the executor or administrator, unless for good cause shown, after notice to the executor or administrator, the court otherwise directs.

Statutes of 1851, p. 472, § 186; 1861, p. 645, § 69; 1863, p. 698, § 1.

NOTE.—A change in this section is made to protect vendors in collecting their purchase money, etc.

The holder
of the mort-
gage or lien
may pur-
chase the
land.
N. S.

His receipt
to the
amount of
his claim a
valid pay-
ment.

SEC. 1570. (§ 186.) No proceedings shall be instituted to foreclose a mortgage or lien against the property of an estate, after a petition for the sale thereof has been filed in good faith, as in this chapter provided. At any sale, under order of the probate court, of lands upon which there is a mortgage or lien, the holder thereof may become the purchaser, and his receipt for the amount due him from the proceeds of the sale is a payment pro tanto. If the amount for which he purchased the property is insufficient to defray the expenses and discharge his mortgage or lien, he must pay to the court or the clerk thereof an amount sufficient to pay such expenses.

NOTE.—This section was suggested by the work of Judge Currey, which, together with the preceding section, supersedes section 176.

SEC. 1571. (§ 188.) If there is any neglect or misconduct in the proceedings of the executor in relation to any sale, by which any person interested in the estate suffers damage, the party aggrieved may recover the same in a suit upon the bond of the executor or administrator, or otherwise, as the case may require.

Administrator and executor liable for misconduct in sale.

Statutes of 1851, p. 472, § 188.

SEC. 1572. (§ 189.) Any executor or administrator who fraudulently sells any real estate of a decedent contrary to or otherwise than under the provisions of this chapter, is liable in double the value of the land sold, as ascertained damages, to be recovered in an action by the person having an estate of inheritance therein.

Fraudulent sales.

Statutes of 1851, p. 472, § 189.

SEC. 1573. (§ 190.) No action for the recovery of any estate, sold by an executor or administrator under the provisions of this chapter, can be maintained by any heir or other person claiming under the decedent, unless it be commenced within three years next after the sale. A suit in equity to set aside the sale may be instituted and maintained at any time within three years from the discovery of the fraud or other grounds upon which the suit is based.

Limitation of actions for vacating sale, etc.

Statutes of 1851, p. 472, § 190.

SEC. 1574. (§ 191.) The preceding section shall not apply to minors or others under any legal disability to sue at the time when the right of action first accrues; but all such persons may commence an action at any time within three years after the removal of the disability.

To what cases preceding section not to apply.

Statutes of 1851, p. 472, § 191.

NOTE.—Guardians have the same provisions. Sections 41, 34.

SEC. 1575. (§ 192.) When a sale has been made by an executor or administrator, of any property of the estate, real or personal, he must return to the probate court, at its next term thereafter, an account of sales, verified by his affidavit. If he neglects to make such return, he

Account of sale to be returned.

may be punished by attachment, or his letters may be revoked, one day's notice having been first given him to appear and show cause why such attachment should not issue or such revocation should not be made.

Statutes of 1851, p. 472, § 192.

Executor,
etc., not to
be pur-
chaser.

SEC. 1576. (§ 193.) No executor or administrator shall, directly or indirectly, purchase any property of the estate he represents, nor shall he be interested in any such sale.

Statutes of 1851, p. 472, § 193.

CHAPTER VIII.

OF THE POWERS AND DUTIES OF EXECUTORS AND ADMINISTRATORS, AND OF THE MANAGEMENT OF ESTATES.

SECTION 1581. Executors to take possession of the entire estate.

1582. Executors may sue and be sued for recovery of property.

1583. May maintain actions for waste, conversion and trespass.

1584. Executor and administrator may be sued for waste or trespass of decedent.

1585. Surviving partner to settle up business. Interest therein to be appraised. Account to be rendered.

1586. Probate judge may appoint receiver to take and settle partnership, when.

1587. Actions on bond of executor or administrator may be brought by another administrator.

1588. What executors are not parties to actions.

1589. May compound.

1590. Recovery of property fraudulently disposed of by testator.

1591. When executor to sue, as provided in preceding section.

1592. Disposition of estate recovered.

Executors to
take posses-
sion of the
entire estate.

SEC. 1581. (§ 194.) The executor or administrator must take into his possession all the estate of the decedent, real and personal, and collect all debts due to the decedent. For the purpose of bringing suits to quiet title, or for partition of such estate, the possession of the executors or administrators is the possession of the heirs or devisees; such possession by the heirs or devisees is subject, however, to the possession of the executor or administrator, for the purposes of administration, as provided in this title.

Statutes of 1851, p. 472, § 194; 1861, p. 643, § 70.

SEC. 1582. (§ 195.) Actions for the recovery of any property, real or personal, or for the possession thereof, and all actions founded upon contracts, may be maintained by and against executors and administrators, in all cases in which the same might have been maintained by or against their respective testators or intestates.

Executors may sue and be sued for recovery of property.

Statutes of 1851, p. 473, § 195.

SEC. 1583. (§ 196.) Executors and administrators may maintain actions against any person who has wasted, destroyed, taken or carried away, or converted to his own use, the goods of their testator or intestate, in his lifetime. They may also maintain actions for trespass committed on the real estate of the decedent in his lifetime.

May maintain actions for waste, conversion and trespass.

Statutes of 1851, p. 473, § 196.

SEC. 1584. (§ 197.) Any person or his personal representatives may maintain an action against the executor or administrator of any testator or intestate who in his lifetime has wasted, destroyed, taken or carried away, or converted to his own use, the goods or chattels of any such person, or committed any trespass on the real estate of such person.

Executor and administrator may be sued for waste or trespass of decedent.

Statutes of 1851, p. 473, § 197.

SEC. 1585. (§ 198.) When a partnership exists between the decedent, at the time of his death, and any other person, the surviving partner has the right to continue in possession of the partnership, and to settle its business, but the interest of the decedent in the partnership must be included in the inventory, and be appraised and appropriated as other property. The surviving partner must settle the affairs of the partnership without delay, and account with the executor or administrator, and pay over such balances as may from time to time be payable to him, in right of the decedent. Upon the application of the executor or administrator, the probate judge may, whenever it appears necessary, order the surviving partner to render an account, and in case of neglect or refusal may, after notice, compel it by attachment; and the executor or administrator may maintain against him any action which the decedent could have maintained.

Surviving partner to settle up business.

Interest therein to be appraised.

Account to be rendered.

Statutes of 1851, p. 473, § 198.

Probate judge may appoint receiver to take and settle partnership, when.
N. S.

SEC. 1586. (§ 198.) If it is shown to the satisfaction of the probate court that the surviving partner is mismanaging the affairs of the partnership, or is not proceeding with reasonable diligence to settle its affairs, or fails to render full and accurate accounts to the executor or administrator of the decedent partner, when required by an order of the court, the probate court or judge may, on motion and notice, appoint a receiver to take charge of, wind up and settle the affairs of the partnership, and for that purpose the receiver shall have all the property and books of the partnership.

NOTE.—It is thought best to authorize the probate court to appoint a receiver to settle the partnership, than to require an estate to be involved in a suit in equity for a dissolution. The jurisdictional power, it is thought, is unquestionable.

Actions on bond of executor or administrator may be brought by another administrator.

SEC. 1587. (§ 199) An administrator may, in his own name, for the use and benefit of all parties interested in the estate, maintain actions on the bond of an executor, or of any former administrator of the same estate.

Statutes of 1851, p. 473, § 199.

What executors are not parties to actions.

SEC. 1588. (§ 200) In actions by or against executors, it is not necessary to join those as parties to whom letters were issued, but have not qualified.

Statutes of 1851, p. 473, § 200.

May compound.

SEC. 1589. (§ 201.) Whenever a debtor of a decedent is unable to pay all his debts, the executor or administrator, with the approbation of the probate court or judge, may compound with him, and give him a discharge upon receiving a fair and just dividend of his effects. A compromise may also be authorized, when it appears to be just and for the best interest of the estate.

Statutes of 1851, p. 473, § 201 ; 1861, p. 645, § 71.

Recovery of property fraudulently disposed of by testator.

SEC. 1590. (§ 202.) When there is a deficiency of assets in the hands of an executor or administrator, and when the decedent, in his lifetime, has conveyed any real estate or any rights or interests therein, with intent to defraud his creditors, or to avoid any right, debt or duty of any person, or has so conveyed such estate that by law the deeds or conveyances are void as against creditors, the executor or administrator must commence and prosecute

to final judgment any proper action for the recovery of the same; and may recover for the benefit of the creditor all such real estate so fraudulently conveyed, and may also, for the benefit of the creditors, sue and recover all goods, chattels, rights or credits which have been so conveyed by the decedent in his lifetime, whatever may have been the manner of such fraudulent conveyance.

Statutes of 1851, p. 473, § 202.

SEC. 1591. (§ 203.) No executor or administrator must sue for such estate as mentioned in the preceding section, for the benefit of the creditors, unless on application of creditors, who must pay such part of the costs and expenses of the suit, or give such security to the executor or administrator therefor, as the probate judge shall direct.

When executor to sue, as provided in preceding section.

Statutes of 1851, p. 474, § 203.

SEC. 1592. (§ 204.) All real estate so recovered must be sold for the payment of debts, in the same manner as if the decedent had died seized thereof, upon obtaining an order therefor from the probate court; and the proceeds of all goods, chattels, rights and credits so recovered must be appropriated in payment of the debts of the decedent, in the same manner as other property in the hands of the executor or administrator.

Disposition of estate recovered.

Statutes of 1851, p. 474, § 204.

CHAPTER IX.

OF THE CONVEYANCE OF REAL ESTATE BY EXECUTORS AND ADMINISTRATORS IN CERTAIN CASES.

SECTION 1597. Executor to complete contracts for sale of real estate.

1598. Petition for executor to make conveyance, and notice of hearing.

1599. Interested parties may contest.

1600. Conveyances, when ordered to be made.

1601. Execution of conveyance and record thereof, how enforced.

1602. Rights of petitioner to enforce contract.

1603. Effect of conveyance.

1604. Effect of recording a copy of the decree.

1605. Recording decree does not supersede power of court to enforce it.

SECTION 1606. Where party to whom conveyance to be made is dead.

1607. Decree may, and when it does, direct possession to be given, it must be surrendered.

Executor to complete contracts for sale of real estate.

SEC. 1597. (§ 205.) When a person who is bound by contract, in writing, to convey any real estate, dies before making the conveyance, and in all cases where such decedent, if living, might be compelled to make such conveyance, the probate court may make a decree authorizing and directing his executor or administrator to convey such real estate to the person entitled thereto.

Statutes of 1851, p. 474, § 205.

Petition for executor to make conveyance, and notice of hearing.

SEC. 1598. (§ 206.) On the presentation of a verified petition by any person claiming to be entitled to such conveyance from an executor or administrator, setting forth the facts upon which the claim is predicated, the probate court must appoint a time and place for hearing the petition, at a regular term of the court; and must order notice thereof to be published at least four successive weeks before such hearing, in such newspaper in this state as he may designate.

Statutes of 1851, p. 474, § 206.

Interested parties may contest.

SEC. 1599. (§ 207.) At the time and place appointed for the hearing, or at such other time to which the same may be postponed, upon satisfactory proof by affidavit or otherwise of the due publication of the notice, the court must proceed to a hearing, and all persons interested in the estate may appear and contest such petition, by filing their objections in writing, and the court may examine, on oath, the petitioner and all who may be produced before him for that purpose.

Statutes of 1851, p. 474, § 207; 1861, p. 646, § 72.

Conveyances when order'd to be made.

SEC. 1600. (§ 208.) If, after a full hearing upon the petition and objections, and examination of the facts and circumstances of the claim, the court is satisfied that the petitioner is entitled to a conveyance of the real estate described in the petition, a decree authorizing and directing the executor or administrator to execute a conveyance thereof to the petitioner must be made, entered on the minutes of the court and recorded.

Statutes of 1851, p. 474, § 208; 1861, p. 646, § 73.

SEC. 1601. (§ 209.) The executor or administrator must execute the conveyance according to the directions of the decree, a certified copy of which must be recorded with the deed in the office of the recorder of the county where the lands lie, and shall be prima facie evidence of the correctness of the proceedings, and of the authority of the executor or administrator to make the conveyance. The court may enforce the decree by attachment, or, if necessary, by the removal of the executor or administrator, for refusal, without notice, and appoint another in his stead.

Execution of conveyance and record thereof, how enforced.

Statutes of 1851, p. 474, § 209; 1861, p. 646, § 74.

SEC. 1602. (§ 210.) If, upon hearing in the probate court, as hereinbefore provided, the right of the petitioner to have a specific performance of the contract is found to be doubtful, the court must dismiss the petition without prejudice to the rights of the petitioner, who may, at any time within six months thereafter, proceed, in the district court, to enforce a specific performance thereof.

Rights of petitioner to enforce contract.

Statutes of 1851, p. 474, § 20; 1861, p. 646, § 75.

SEC. 1603. (§ 211.) Every conveyance made in pursuance of a decree of the probate court, as provided in this chapter, shall pass the title to the estate contracted for as fully as if the contracting party himself was still living and executed the conveyance.

Effect of conveyance.

Statutes of 1851, p. 474, § 211.

SEC. 1604. (§ 212.) A copy of the decree for a conveyance, made by the probate court, and duly certified and recorded in the office of the recorder of the county where the lands lie, gives the person entitled to the conveyance a right to the possession of the lands contracted for, and to hold the same according to the terms of the intended conveyance, in like manner as if they had been conveyed in pursuance of the decree.

Effect of recording a copy of the decree.

Statutes of 1851, p. 474, § 212.

SEC. 1605. (§ 213.) The recording of any decree, as provided in the preceding section, shall not prevent the court making the decree from enforcing the same by other process.

Recording decree does not supersede power of court to enforce it.

Statutes of 1851, p. 474, § 213.

Where party
to whom
conveyance
to be made
is dead.

SEC. 1606. (§ 214.) If the person entitled to the conveyance dies before the commencement of proceedings therefor under this chapter, or before the completion of the conveyance, any person entitled to succeed to his rights in the contract, or the executor or administrator of such decedent may, for the benefit of the person so entitled, commence such proceedings or prosecute any already commenced, and the conveyance must be so made as to vest the estate in the persons entitled to it, or in the executor or administrator, for their benefit.

Statutes of 1851, p. 474, § 214.

Decree may,
and when it
does, direct
possession
to be given,
it must be
surrendered.
N. S.

SEC. 1607. (§ 214.) The decree provided for in this chapter may direct the possession of the property therein described to be surrendered to the person entitled thereto, upon his producing the deed and a certified copy of the decree, when, by the terms of the contract, possession is to be surrendered. This provision may be enforced by a writ of assistance.

CHAPTER X.

OF ACCOUNTS RENDERED BY EXECUTORS AND ADMINISTRATORS, AND OF THE PAYMENT OF DEBTS.

ARTICLE I. LIABILITIES AND COMPENSATION OF EXECUTORS AND ADMINISTRATORS.

II. ACCOUNTING AND SETTLEMENTS BY EXECUTORS AND ADMINISTRATORS.

III. THE PAYMENT OF DEBTS OF THE ESTATE.

ARTICLE I.

LIABILITIES AND COMPENSATION OF EXECUTORS AND ADMINISTRATORS.

SECTION 1612. When executor or administrator personally liable.

1613. Executor to be charged with all estate, etc.

1614. Not to profit or lose by estate.

1615. Uncollected debts without fault.

1616. Compensation of the executor and administrator.

1617. Not to purchase claims against the estates.

1618. Executor's and administrator's commissions.

SEC. 1612. (§ 215.) No executor or administrator is chargeable upon any special promise to answer damages or to pay the debts of the testator or intestate out of his own estate, unless the agreement for that purpose, or some memorandum or note thereof, is in writing and signed by such executor or administrator, or by some other person by him thereunto specially authorized, and approved by the probate court.

When executor or administrator personally liable.

Statutes of 1851, p. 476, § 215.

SEC. 1613. (§ 216.) Every executor and administrator is chargeable in his account with the whole of the estate of the decedent which may come into his possession, at the value of the appraisement contained in the inventory, except as provided in the following sections, and with all the interest, profit and income of the estate.

Executor to be charged with all estate, etc.

Statutes of 1851, p. 476, § 216.

SEC. 1614. (§ 217.) He shall not make profit by the increase, nor suffer loss by the decrease or destruction, without his fault, of any part of the estate. He must account for the excess when he sells any part of the estate for more than the appraisement, and if any is sold for less than the appraisement, he is not responsible for the loss, if the sale has been justly made.

Not to profit or lose by estate.

Statutes of 1851, p. 476, § 217.

SEC. 1615. (§ 218.) No executor or administrator is accountable for any debts due to the decedent, if it appears that they remain uncollected without his fault.

Uncollected debts without fault.

Statutes of 1851, p. 476, § 218.

SEC. 1616. (§ 219.) He shall be allowed all necessary expenses in the care, management and settlement of the estate, and for his services such fees as provided in this chapter; but when the decedent, by his will, makes some other provision for the compensation of his executor, that shall be a full compensation for his services, unless, by a written instrument, filed in the probate court, he renounces all claim for compensation provided by the will.

Compensation of the executor and administrator.

Statutes of 1851, p. 476, § 219.

SEC. 1617. (§ 220.) No administrator or executor shall purchase any claim against the estate he represents; and

Not to purchase claims against the estates.

if he pays any claim for less than its nominal value he is only entitled to charge in his account the amount he actually paid.

Statutes of 1851, p. 476, § 220.

Executor's
and adminis-
trator's com-
missions.

SEC. 1618. (§ 221.) When no compensation is provided by the will, or the executor renounces all claim thereto, he must be allowed commissions upon the amount of the whole estate accounted for by him, as follows: For the first thousand dollars, at the rate of seven per cent.; for all above that sum and not exceeding ten thousand dollars, at the rate of five per cent.; for all above that sum, at the rate of four per cent.; and the same commission must be allowed administrators. In all cases, such further allowance may be made as the probate judge may deem just and reasonable, for any extraordinary service. The total amount of such allowance must not exceed the amount of commissions allowed by this section. Executors or administrators must not be allowed commissions on the value of real estate not sold by them.

Statutes of 1851, p. 476, § 221; 1861, p. 646, § 76.

NOTE.—The amendment proposed is that contained in the last clause. If nothing is done with the lands, no reason exists for allowing the administrator a percentage; if it is rented, commissions will be received on the rent received; if partitioned, the court is permitted to make compensation.

ARTICLE II.

ACCOUNTING AND SETTLEMENTS BY EXECUTORS AND ADMINISTRATORS.

SECTION 1622. To render an exhibit of receipts and disbursements, and claims allowed.

1623. Citation to account at third term.

1624. Petition for citation to render final or other account.

1625. Citation to account on application.

1626. Objections to account, who may file.

1627. Attachment for not obeying citation.

1628. To render accounts at expiration of term.

1629. Executor to account after his authority revoked.

1630. Revoking authority of executor, when.

1631. To produce and file vouchers, which remain in court.

1632. Vouchers for items less than twenty dollars, when excepted.

1633. Day of settlement to be appointed, and must give notice thereof.

SECTION 1634. Final settlement, partition and distribution may be made at same time. Postponing order is notice.

1635. Interested party may file exceptions to account.

1636. All matters may be contested by the heirs. Hearing may be postponed.

1637. Settlement of accounts to be conclusive, when and when not.

1638. Proof of notice of settlement of accounts.

SEC. 1622. (§ 222) At the third term of the court after his appointment, and thereafter at any time when required by the court, either upon its own motion or upon the application of any person interested in the estate, the executor or administrator must render, for the information of the court, an exhibit under oath, showing the amount of money received and expended by him, the amount of all claims presented against the estate and the names of the claimants, and all other matters necessary to show the condition of its affairs.

To render an exhibit of receipts and disbursements, and claims allowed.

Statutes of 1851, p. 477, § 222.

SEC. 1623. (§ 223.) If the executor or administrator fails to render an exhibit at the third term of the court, the judge of the probate court must cause a citation to be issued requiring him to appear and render it.

Citation to account at third term.

Statutes of 1851, p. 477, § 223.

SEC. 1624. (§ 224.) Any person interested in the estate may, at any time before the final settlement of accounts, present his petition to the probate judge, praying that the executor or administrator be required to appear and render such exhibit, setting forth the facts showing that it is necessary and proper that such an exhibit should be made.

Petition for citation to render final or other account.

Statutes of 1851, p. 477, § 224.

SEC. 1625. (§ 225.) If the judge is satisfied, either from the oath of the applicant or from any other testimony offered, that the facts alleged are true, and considers the showing of the applicant sufficient, he must direct a citation to be issued to the executor or administrator, requiring him to appear at some day to be named in the citation, which must be during a term of the court, and render an exhibit as prayed for.

Citation to account on application.

Statutes of 1851, p. 477, § 225.

Objections to
account, who
may file.

SEC. 1626. (§ 226.) When an exhibit is rendered by an executor or administrator, any person interested may appear and, by objections in writing, contest any account or statement therein contained. The court may examine the executor or administrator, and if he has been guilty of neglect, or has wasted, embezzled or mismanaged the estate, his letters must be revoked.

Statutes of 1851, p. 477, § 226.

Attachment
for not obey-
ing citation.

SEC. 1627. (§ 227.) If any executor or administrator neglects or refuses to appear and render an exhibit, after having been duly cited, an attachment may be issued against him and such exhibit enforced, or his letters may be revoked, in the discretion of the court.

Statutes of 1851, p. 477, § 227.

To render
accounts at
expiration
of term.

SEC. 1628. (§ 228.) Every executor or administrator must render a full account and a report of his administration at the expiration of one year from the time of his appointment. If he fails to present his account, the court or judge must compel the rendering of the account by attachment, and any person interested in the estate may apply for and obtain an attachment, but no attachment must issue unless a citation has been first issued, served and returned, requiring the executor or administrator to appear and show cause why an attachment should not issue. Every account rendered must exhibit not only the debts which have been paid, but also a statement of all debts which have been duly presented and allowed during the period embraced in the account.

Statutes of 1851, p. 477, § 228; 1861, p. 647, § 77.

Executor to
account after
his authority
revoked.

SEC. 1629. (§ 229.) When the authority of an executor or administrator ceases or is revoked for any reason, he may be cited to account before the probate court at the instance of the person succeeding to the administration of the same estate, in like manner as he might have been cited by any person interested in the estate during the time he was executor or administrator.

Statutes of 1851, p. 477, § 229.

Revoking
authority of
executor,
when.

SEC. 1630. (§ 230.) If the executor or administrator resides out of the county, or absconds or conceals himself so that the citation cannot be personally served, and

neglects to render an account within thirty days after the time prescribed in this article, or if he neglects to render an account within thirty days after being committed where the attachment has been executed, his letters must be revoked.

Statutes of 1851, p. 478, § 230.

SEC. 1631. (§ 231.) In rendering his account, the executor or administrator must produce and file vouchers for all charges, debts, claims and expenses which he has paid, which must remain in the court; and he may be examined on oath touching such payments, and also touching any property and effects of the decedent, and the disposition thereof. When any voucher is required for other purposes, it may be withdrawn on leaving a certified copy on file; if a voucher is lost, or for other good reason cannot be produced on the settlement, the payment may be proved by the oath of any competent witness.

To produce and file vouchers, which remain in court.

Statutes of 1851, p. 478, § 231; 1861, p. 647, § 78.

SEC. 1632. (§ 232.) On the settlement of his account he may be allowed any item of expenditure, not exceeding twenty dollars, for which no voucher is produced, if such item be supported by his own uncontradicted oath positive to the fact of payment, specifying when, where and to whom it was made; but such allowances in the whole must not exceed five hundred dollars against any one estate.

Vouchers for items less than \$20, when excepted.

Statutes of 1851, p. 478, § 232.

SEC. 1633. (§ 233.) When any account is rendered for settlement, the court or judge must appoint a day for the settlement thereof; the clerk must thereupon give notice thereof, by causing notices to be posted in at least three public places in the county, setting forth the name of the estate, the executor or administrator, and the day appointed for the settlement of the account, which must be on some day of a term of the court. The court or probate judge may order such further notice to be given as he may deem proper.

Day of settlement to be appointed, and must give notice thereof.

Statutes of 1851, p. 478, § 233; 1861, p. 478, § 79.

SEC. 1634. If the account mentioned in the preceding section is for a final settlement, and the estate is ready

Final settlement, partition and distribution may be made at same time N. S.

Postponing
order is
notice.

for distribution and partition, the notice thereof required to be published must state these facts ; and, on confirmation of the final account, distribution and partition of the estate to all entitled thereto must be immediately had, without further notice or proceedings. If, from any cause, the hearing of the account or the partition and distribution is postponed, the order postponing the same to a day certain is notice to all persons interested therein.

Interested
party may
file excep-
tions to
account.

SEC. 1635. (§ 234.) On the day appointed, or any subsequent day to which the hearing may be postponed by the court, any person interested in the estate may appear and file his exceptions in writing to the account, and contest the same.

Statutes of 1851, p. 478, § 234.

All matters
may be con-
tested by the
heirs.

Hearing may
be postponed

SEC. 1636. (§§ 235, 236.) All matters, including allowed claims not passed upon on the settlement of any former account, or on rendering an exhibit, or on making a decree of sale, may be contested by the heirs, for cause shown. The hearing and allegations of the respective parties may be postponed from time to time, when necessary, and the court may appoint one or more referees to examine the accounts and make report thereon, subject to confirmation ; and may allow a reasonable compensation to the referees, to be paid out of the estate of the decedent.

Statutes of 1851, p. 478, §§ 235-6 ; 1861, p. 647, §§ 80-1.

NOTE.—The greater portion of section 235 is omitted, inasmuch as one section provides for all appointments of attorneys for heirs, etc.

Settlement
of accounts
to be conclu-
sive, when
and when
not.

SEC. 1637. (§ 237.) The settlement of the account and the allowance thereof by the court, or upon appeal, is conclusive against all persons in any way interested in the estate, saving, however, to all persons laboring under any legal disability, their rights to proceed against the executor or administrator, either individually or upon his bond, within two years after their respective disabilities cease, and in any action brought by any such person, the allowance and settlement of the account is prima facie evidence of its correctness.

Statutes of 1851, p. 478, § 237.

SEC. 1638. (§ 238.) The account must not be allowed by the court until it is first proved that notice has been given as required by this chapter, and the decree must show that such proof was made to the satisfaction of the court, and is prima facie evidence of the fact.

Proof of notice of settlement of accounts.

Statutes of 1851, p. 479, § 238.

ARTICLE III.

THE PAYMENT OF DEBTS OF THE ESTATE.

SECTION 1643. Order in which debts to be paid.

1644. Where property insufficient to pay mortgage.

1645. Estate insufficient, a dividend to be paid.

1646. Funeral expenses and expenses of last sickness.

1647. Order for payment of debts and discharge of the executor or administrator.

1648. Provision for disputed and contingent claims.

1649. After decree for payment of debts, executor personally liable to creditors.

1650. Claims not included in order for payment of debts, how disposed of.

1651. Order for payment of legacies and extension of time.

1652. Final account, when to be made.

1653. Neglect to render final account, how treated.

SEC. 1643. (§ 239.) The debts of the estate must be paid in the following order :

Order in which debts to be paid.

1. Funeral expenses.

2. The expenses of the last sickness.

3. Debts having preference by the laws of the United States.

4. Judgments rendered against the decedent in his lifetime, and mortgages, in the order of their date.

5. All other demands against the estate.

Statutes of 1851, p. 479, § 239.

SEC. 1644. (§ 240.) The preference given in the preceding section to a mortgage only extends to the proceeds of the property mortgaged. If the proceeds of such property is insufficient to pay the mortgage, the part remaining unsatisfied must be classed with other demands against the estate.

Where property insufficient to pay mortgage.

Statutes of 1851, p. 479, § 240.

Estate insufficient, a dividend to be paid.

SEC. 1645. (§ 241.) If the estate is insufficient to pay all the debts of any one class, each creditor must be paid a dividend in proportion to his claim; and no creditor of any one class shall receive any payment until all those of the preceding class are fully paid.

Statutes of 1851, p. 479, § 241.

Funeral expenses and expenses of last sickness.

SEC. 1646. (§ 242.) The executor or administrator, as soon as he has sufficient funds in his hands, must pay the funeral expenses and the expenses of the last sickness, and the allowance made to the family of the decedent. He may retain in his hands the necessary expenses of administration, but he is not obliged to pay any other debt or any legacy until, as prescribed in this article, the payment has been ordered by the court.

Statutes of 1851, p. 479, § 242.

Order for payment of debts and discharge of the executor or administrator.

SEC. 1647. (§ 243.) Upon the settlement of the accounts of the executor or administrator, at the end of the year, as required in this chapter, the court must make an order for the payment of the debts, as the circumstances of the estate require. If there is not sufficient funds in the hands of the executor or administrator, the court must specify in the decree the sum to be paid to each creditor. If the whole property of the estate be exhausted by such payment or distribution, such account must be considered as a final account, and the executor or administrator is entitled to his discharge, on producing and filing the necessary vouchers and proofs showing that such payments have been made, and that he has fully complied with the decree of the court.

Statutes of 1851, p. 479, § 243; 1861, p. 648, § 82.

Provision for disputed and contingent claims.

SEC. 1648. (§ 244.) If there is any claim not due, or any contingent or disputed claim against the estate, the amount thereof, or such part of the same as the holder would be entitled to if the claim were due, established or absolute, must be paid into the court, and there remain, to be paid over to the party when he becomes entitled thereto; or, if he fails to establish his claim, to be paid over or distributed as the circumstances of the estate require. If any creditor whose claim has been allowed, but is not yet due, appears and assents to a deduction there-

from of the legal interest for the time the claim has yet to run, he is entitled to be paid accordingly. The payments provided for in this section are not to be made when the estate is insolvent, unless a pro rata distribution is ordered.

Statutes of 1851, p. 479, § 244.

SEC. 1649. (§ 245.) When a decree is made by the probate court for the payment of creditors, the executor or administrator is personally liable to each creditor for his allowed claim, or the dividend thereon, and execution may be issued on such decree, as upon a judgment in the district court, in favor of each creditor, and the same proceeding may be had under such execution as if it had been issued from the district court. The executor or administrator is liable therefor, on his bond, to each creditor.

After decree for payment of debts, executor personally liable to creditors.

Statutes of 1851, p. 480, § 245.

SEC. 1650. (§ 246.) When the accounts of the administrator or executor have been settled, and an order made for the payment of debts and distribution of the estate, no creditor whose claim was not included in the order for payment has any right to call upon the creditors who have been paid, or upon the heirs, devisees or legatees, to contribute to the payment of his claim; but if the executor or administrator has failed to give the notice to the creditors, as prescribed in section fourteen hundred and ninety-one, such creditor may recover on the bond of the executor or administrator the amount of his claim, or such part thereof as he would have been entitled to had it been allowed. This section shall not apply to any creditor whose claim was not due ten months before the day of settlement, or whose claim was contingent and did not become absolute ten months before such day.

Claims not included in order for payment of debts, how disposed of.

Statutes of 1851, p. 480, § 246.

SEC. 1651. (§ 247.) If the whole of the debts have been paid by the first distribution, the court must direct the payment of legacies and the distribution of the estate among the heirs, legatees, or other persons entitled, as provided in the next chapter; but if there be debts remaining unpaid, or if, for other reasons, the estate be not in a proper condition to be closed, the court must give such

Order for payment of legacies and extension of time

extension of time as may be reasonable, for a final settlement of the estate.

Statutes of 1851, p. 480, § 247; 1861, p. 648, § 83.

Final account, when to be made.

SEC. 1652. (§ 248.) At the time designated in the last section, or sooner, if within that time all the property of the estate has been sold, or there are sufficient funds in his hands for the payment of all the debts due by the estate, and the estate be in a proper condition to be closed, the executor or administrator must render a final account and pray a settlement of his administration.

Statutes of 1851, p. 480, § 248; 1861, p. 648, § 84.

Neglect to render final account, how treated.

SEC. 1653. (§ 249.) If he neglects to render his account, the same proceedings may be had as prescribed in this chapter in regard to the first account to be rendered by him, and all the provisions of this chapter relative to the last mentioned account, and the notice and settlement thereof, apply to his account presented for final settlement.

Statutes of 1851, p. 480, § 249.

CHAPTER XI.

OF THE PARTITION, DISTRIBUTION AND FINAL SETTLEMENT OF ESTATES.

ARTICLE I. PARTIAL DISTRIBUTION PRIOR TO FINAL SETTLEMENT.

II. DISTRIBUTION ON FINAL SETTLEMENT.

III. PARTITION OF REAL ESTATE AND DISTRIBUTION.

IV. AGENTS FOR ABSENT INTERESTED PARTIES, AND FINAL SETTLEMENT.

ARTICLE I.

PARTIAL DISTRIBUTION PRIOR TO FINAL SETTLEMENT.

SECTION 1658. Payment of legacies upon giving bonds.

1659. Notice of application for legacies.

1660. Executor or other person may resist application.

1661. Decree prayed for to require bond, which must be given.

May order whole or part of share to be delivered. Where partition necessary, how made. Costs.

1662. Order for payment of bond, and suit thereon.

Sec. 1658. (§ 250.) At any time after the lapse of four months from the issuing of letters testamentary or of administration, any heir, devisee or legatee may present his petition to the court for the legacy or share of the estate to which he is entitled, to be given to him upon his giving bonds, with security, for the payment of his proportion of the debts of the estate.

Payment of legacies upon giving bonds.

Statutes of 1851, p. 480, § 250; 1861, p. 248, § 85.

Sec. 1659. (§ 251.) Notice of the application must be given to the executor or administrator, personally, and to all persons interested in the estate, in the same manner that notice is required to be given of the settlement of the account of an executor or administrator.

Notice of application for legacies.

Statutes of 1861, p. 480, § 251; 1861, p. 248, § 86.

Sec. 1660. (§ 252.) The executor or administrator, or any person interested in the estate, may appear at the time named and resist the application, or any other heir, devisee or legatee may make a similar application for himself.

Executor or other person may resist application.

Statutes of 1851, p. 481, § 252.

Sec. 1661. (§§ 253, 254, 255, 256.) If, at the hearing, it appears that the estate is but little indebted, and that the share of the party applying may be allowed to him without loss to the creditors of the estate, the court must make an order in conformity with the prayer of the applicant, requiring—

Decree prayed for to require bond, which must be given.

1. Each heir, legatee or devisee obtaining such order, before receiving his share or any portion thereof, to execute and deliver to the executor or administrator a bond, in such sum as shall be designated therein, with sureties to be approved by the judge, payable to the executor or administrator, and conditioned for the payment, whenever required, of his proportion of the debts due from the estate, not exceeding the value or amount of the legacy or portion of the estate to which he is entitled.

2. The executor or administrator to deliver to the heir, legatee or devisee the whole portion of the estate to which he may be entitled, or only a part thereof, designating it.

May order whole or part of share to be delivered.

If, in the execution of the order, a partition is necessary between two or more of the parties interested, it

Where partition necessary, how made.

Costs.

must be made in the manner hereinafter prescribed. The costs of these proceedings to be paid by the applicant, or if there be more than one, to be apportioned equally amongst them.

Statutes of 1851, p. 481, §§ 253-6.

NOTE.—The various requirements to be embodied in the decree of partial distribution, made prior to final settlement, as provided in old sections 253-6, are embraced in this one section.

Order of
payment of
bond, and
suit thereon.

SEC. 1662. (§ 257.) When any bond has been executed and delivered under the provisions of the preceding section, and it is necessary for the settlement of the estate to require the payment of any part of the money thereby secured, the executor or administrator must petition the court for an order requiring the payment, and have a citation issued and served on the party bound, requiring him to appear and show cause why the order should not be made. At the hearing, the court, if satisfied of the necessity of such payment, must make an order accordingly, designating the amount and giving a time within which it must be paid. If the money is not paid within the time allowed, an action may be maintained by the executor or administrator on the bond.

Action on
bond.

Statutes of 1851, p. 481, § 257.

ARTICLE II.

DISTRIBUTION ON FINAL SETTLEMENT.

SECTION 1665. Distribution of estate, how made and to whom.

1666. What the decree must contain, and is final.

1667. Distribution when decedent was not a resident of this state.

1668. Decree to be made only after notice.

1669. No distribution to be ordered till all taxes on personal property are paid.

Distribution
of estate,
how made
and to whom

SEC. 1665. (§ 258.) Upon the final settlement of the accounts of the executor or administrator, or at any subsequent time, upon the application of the executor or administrator, or of any heir, legatee or devisee, the court must proceed to distribute the residue of the estate in the hands of the executor or administrator, if any, among the persons who by law are entitled thereto; and if the decedent has left a surviving child, and the issue of other

children, and any of them, before the close of administration, have died while under age and not having been married, no administration on such deceased child's estate is necessary, but all the estate which such deceased child was entitled to by inheritance must, without administration, be distributed to the other heirs at law. A statement of any receipts and disbursements of the executor or administrator, since the rendition of his final accounts, must be reported and filed at the time of making such distribution, and a settlement thereof, together with an estimate of the expenses of closing the estate, must be made by the court, and included in the order or decree; or the court or judge may order notice of the settlement of such supplementary account, and refer the same as in other cases of the settlement of accounts.

Statutes of 1851, p. 481, § 258; 1865-6, p. 329, § 2.

Sec. 1666. (§ 259.) In the order or decree, the court must name the persons and the proportions or parts to which each shall be entitled, and such persons may demand, sue for and recover their respective shares from the executor or administrator, or any person having the same in possession. Such order or decree is conclusive as to the rights of heirs, legatees or devisees, subject only to be reversed, set aside or modified on appeal, in the manner and within the time provided in this title.

What the decree must contain, and is final.

Statutes of 1851, p. 481, § 259; 1865-6, p. 765, § 10.

Sec. 1667. (§ 259.) Upon application for distribution, after final settlement of the accounts of administration, if the decedent was a non-resident of this state, leaving a will which has been duly proved or allowed in the state of his residence, and an authenticated copy thereof has been admitted to probate in this state, and it is necessary, in order that the estate or any part thereof may be distributed according to the will, that the estate in this state should be delivered to the executor or administrator in the state where the decedent died, the court may order such delivery to be made, and, if necessary, order a sale of the real estate, and a like delivery of the proceeds. The delivery, in accordance with the order of the court, is a full discharge of the executor or administrator with the will annexed, in this state, in relation to all prop-

Distribution when decedent was not a resident of this state.

erty embraced in such order, which, unless reversed on appeal, binds and concludes all parties in interest. Sales of real estate ordered by virtue of this section must be made in the same manner, as other sales of real estate of decedents by order of the probate court.

Statutes of 1851, p. 481, § 259 ; 1865-6, p. 766, § 12.

Decree to be
made only
after notice.

SEC. 1668. (§ 260.) The order or decree may be made on the petition of the executor or administrator, or of any person interested in the estate, but notice must be given, or waived, unless the time for distribution is announced and fixed by order of the court, entered at the time final settlement is made ; and all other proceedings must be had in the manner provided in article four, chapter seven, of this title, for sale of real estate by an executor or administrator. The court may order such further notice to be given as it may deem proper. If partition be applied for, as provided in this chapter, such decree shall not divest the court of jurisdiction for the purposes of partition, unless the estate be finally closed.

Statutes of 1851, p. 482, § 260 ; 1861, p. 649, § 88.

No distribu-
tion to be
ordered till
all taxes on
personal
property are
paid.
N 8

SEC. 1669. (§ 260.) Before any decree of distribution of an estate is made, the probate court must be satisfied, by the oath of the executor or administrator, or otherwise, that all state, county and municipal taxes, legally levied upon personal property of the estate, have been fully paid.

Statutes of 1865-6, p. 521.

ARTICLE III.

PARTITION OF REAL ESTATE AND DISTRIBUTION.

SECTION 1672. Estate in common. Commissioners.

1673. Partition of property held by estate and stranger in common, or as joint tenants or coparceners, how made.

1674. Probate court, instead of making partition, may direct action therefor to be brought in the district court.

1675. Partition and notice thereof, and the time of filing petition.

1676. Estate in different counties, how divided.

1677. Partition may be made although some of the heirs, etc., have parted with their interest.

1678. Shares to be set out by metes and bounds.

1679. Whole estate may be assigned to one, in certain cases.

1680. Payments for equality of partition, by whom and how.

SECTION 1681. Estate may be sold.

1682. Division by partition binding. When action may be brought in district court.

1683. To give notice to all persons and guardians before partition. Duties of commissioners.

1684. To make report, and partition to be recorded.

1685. When commissioners to make partition are not necessary.

1686. Advancements made to heirs.

SEC. 1672. (§ 261.) When the estate, real or personal, assigned by the decree of distribution to two or more heirs, devisees or legatees, is in common and undivided, and the respective shares are not separated and distinguished, partition may be made by three disinterested persons, to be appointed commissioners for that purpose by the probate court or judge, who must be duly sworn to the faithful discharge of their duties. A certified copy of the order of their appointment, and of the order or decree assigning and distributing the estate, must be issued to them as their warrant, and their oath must be indorsed thereon. Upon consent of the parties, or when the court deems it proper and just, it is sufficient to appoint one commissioner only, who has the same authority and is governed by the same rules as if three were appointed.

Estate in common.

Commissioners.

Statutes of 1851, p. 482, § 261; 1861, p. 649, § 89.

NOTE.—Here, again, arises the question of jurisdiction discussed in notes to article 5, which is provided for in the next section and omitted in this.

SEC. 1673. (§ 261.) Property held in common as joint tenants or as coparceners by the decedent and a stranger to his estate, may be partitioned as provided in the preceding section, on filing in the probate court a stipulation in writing, signed by all the parties having, or claiming to have, an interest therein, and acknowledged by them as the execution of deeds are required to be acknowledged, giving consent to such partition, and agreeing to submit their respective claims or interests therein to three commissioners as arbitrators, whose report must be filed in and become a decree of the district and probate courts. Unless such consent and agreement is so signed, acknowledged and filed, the probate court must direct proceedings to be instituted in the proper district court by the executor or administrator, for partition of such property.

Partition of property held by estate and stranger in common, or as joint tenants or coparceners, how made. N. S.

Statutes of 1851, p. 482, § 261; 1861, p. 649, § 89.

Probate court, instead of making partition, may direct action therefor to be brought in district court N. S.

SEC. 1674. (§ 261.) Instead of making actual partition and division of the real property of an estate between the heirs, devisees or legatees, by commissioners, as in this chapter provided for, if, from any cause, the probate court deems it best, or a majority of the heirs, devisees or legatees shall petition therefor, the probate court must direct action for partition to be brought in the proper district court. The making of such order divests the probate court of further jurisdiction over the subject matter of partition of the estate.

Partition and notice thereof, and the time of filing petition.

SEC. 1675. (§ 263) If action for partition among the heirs, devisees or legatees is not ordered to be brought in the district court as provided in the preceding section, partition may be ordered and had in the probate court on the petition of any person interested. But before commissioners are appointed, or partition ordered by the probate court as directed in this chapter, notice thereof must be given to all persons interested, who reside in this state, or to their guardians, and to the agents, attorneys or guardians, if any in this state, of such as reside out of the state, either personally or by public notice, as the probate court may direct. The petition may be filed, attorneys, guardians and agents appointed, and notice given, at any time before the order or decree of distribution, but the commissioners must not be appointed until the order or decree is made assigning the estate. When the petition is solely for partition between the estate and a stranger thereto, application may be made and partition ordered, at any time the court may direct, on filing the stipulation and agreement hereinbefore provided for, properly executed and acknowledged.

Statutes of 1851, p. 482, § 263 ; 1861, p. 649, § 91.

Estate in different counties, how divided.

SEC. 1676. (§ 262.) If the real estate is in different counties, the probate court may, if deemed proper, appoint a commissioner for all, or different commissioners for each county. The estate in each county must be divided separately among the heirs, devisees or legatees, as if there was no other estate to be divided, but the commissioner first appointed must, unless otherwise directed by the probate court, make division of such real estate, wherever situated within this state.

Statutes of 1851, p. 482, § 262 ; 1861, p. 649, § 90.

NOTE.—For convenience, sections 262 and 263 have changed places.

SEC. 1677. (§ 264.) Partition of the real estate may be made as provided in this chapter, although some of the original heirs, legatees or devisees may have conveyed their shares to other persons, and such shares must be assigned to the person holding the same, in the same manner as they otherwise would have been to such heirs, legatees or devisees.

Partition may be made although some of the heirs, etc., have parted with their interest.

Statutes of 1851, p. 482, § 264.

SEC. 1678. (§ 265.) The several shares in the real and personal estate must be set out to each individual in proportion to his right, by metes and bounds, or description, so that the same can be easily distinguished, unless two or more of the parties interested consent to the setting apart of their shares in common and undivided.

Shares to be set out by metes and bounds.

Statutes of 1851, p. 482, § 265.

SEC. 1679. (§ 266.) When the real estate cannot be divided without prejudice or inconvenience to the owners, the probate court may assign the whole to one or more of the parties entitled to share therein who will accept it, always preferring the males to the females, and among children preferring the elder to the younger. The parties accepting the whole must pay to the other parties interested their just proportion of the true value thereof, or secure the same to their satisfaction, or, in case of the minority of such party, then to the satisfaction of his guardian, and the true value of the estate must be ascertained and reported by commissioners. When the commissioners appointed to make partition are of the opinion that the real estate cannot be divided without prejudice or inconvenience to the owners, they must so report to the court, and recommend that the whole be assigned as herein provided, and must find and report the true value of such real estate. On filing the report of the commissioners, and on making or securing the payment hereinbefore provided for, the court, if it appears just and proper, must confirm the report, and thereupon the assignment is complete, and the title to the whole of such real estate vests in the person to whom the same is so assigned.

Whole estate may be assigned to one, in certain cases.

Statutes of 1851, p. 482, § 266; 1863-4, p. 371, § 15.

Payments
for equality
of partition,
by whom
and how.

SEC. 1680. (§ 267.) When any tract of land or tenement is of greater value than any one's share in the estate to be divided, and cannot be divided without injury to the same, it may be set off by the commissioners appointed to make partition to any of the parties who will accept it, giving preference as prescribed in the preceding section. The party accepting must pay or secure to the others such sums as the commissioners shall award to make the partition equal, and the commissioners must make their partition accordingly; but such partition must not be established by the court until the sums awarded are paid to the parties entitled to the same, or secured to their satisfaction.

Statutes of 1851, p. 483, § 267.

Estate may
be sold.

SEC. 1681. (§ 268.) When it appears to the court, from the commissioners' report, that it cannot otherwise be fairly divided, the whole or any part of the estate, real or personal, may be sold by order of the court, by the executor or administrator, or by a commissioner appointed for that purpose, and the proceeds distributed. The sale must be conducted, reported and confirmed, in the same manner and under the same requirements provided in article four, chapter seven, of this title.

Statutes of 1851, p. 483, § 268; 1861, p. 650, § 93.

Division by
partition
binding.

SEC. 1682. (§ 269.) When partition of real estate among heirs, legatees or devisees is required, and such real estate is in common and undivided with the real estate of any other person, and the stipulation and agreement, duly acknowledged, is filed as hereinbefore required, the commissioners must first divide and sever the estate of the decedent from the estate in which it lies in common, and such division so made and established by the probate court is binding upon all persons interested. Upon the application by petition of the heirs or creditors, or any of them, the probate court may authorize the executor or administrator to bring suit for such partition in the district court. Such suit may also be brought by an executor; when so authorized by the terms of the will.

When action
may be bro't
in district
court.

Statutes of 1851, p. 483, § 269; 1861, p. 650, § 94.

SEC. 1683. (§ 270.) Before any partition is made or any estate divided, as provided in this chapter, notice must be given to all persons interested in the partition, their guardians, agents or attorneys, by the commissioners, of the time and place, when and where, they shall proceed to make partition. The commissioners may take testimony, order surveys and take such other steps as may be necessary to enable them to form a judgment upon the matters before them.

To give notice to all persons and guardians before partition.

Duties of commissioners.

Statutes of 1851, p. 483, § 270; 1861, p. 650, § 95.

NOTE.—That portion of the original section omitted is embodied in a section providing for Attorneys generally.

SEC. 1684. (§ 271.) The commissioners must report their proceedings, and the partition agreed upon by them, to the probate court, in writing, and the court may, for sufficient reasons, set aside the report and commit the same to the same commissioners or appoint others; and when such report is finally confirmed, a certified copy of the judgment or decree of partition made thereon, attested by the clerk, under the seal of the court, must be recorded in the office of the recorder of the county where the lands lie.

To make report, and partition to be recorded.

Statutes of 1851, p. 483, § 271; 1861, p. 651, § 96.

SEC. 1685. (§ 272.) When the probate court makes a judgment or decree assigning the residue of any estate to one or more persons entitled to the same, it is not necessary to appoint commissioners to make partition or distribution thereof, unless the parties to whom the assignment is decreed, or some of them, request that such partition be made.

When commissioners to make partition are not necessary.

Statutes of 1851, p. 483, § 272.

SEC. 1686. (§ 273.) All questions as to advancements made, or alleged to have been made, by the decedent to his heirs, may be heard and determined by the probate court, and must be specified in the decree assigning and distributing the estate; and the final judgment or decree of the probate court, or, in case of appeal, of the supreme court, is binding on all parties interested in the estate.

Advancements made to heirs.

Statutes of 1851, p. 483, § 272; 1861, p. 651, § 97.

NOTE.—In this and the succeeding article “decrees,” as used in former statutes, are called “decrees or orders,” and “decrees or judgments,” as circumstances require, to conform them to the definition in a preceding portion of this code.

ARTICLE IV.

AGENTS FOR ABSENT INTERESTED PARTIES, AND FINAL SETTLEMENT.

SECTION 1691. Court may appoint agent to take possession for absentees.

1692. Agent to give bond, and his compensation.

1693. Unclaimed estate, how disposed of.

1694. When real and personal property of absentee to be sold.

1695. Liability of agent on his bond.

1696. Certificate to claimant.

1697. Final settlement, decree and discharge.

1698. Discovery of property.

Court may
appoint
agent to take
possession
for absentees

SEC. 1691. (§ 274.) When any estate is assigned by a judgment or decree of the court, as provided in this chapter, to any person residing out of, and having no agent in, this state, and it is necessary that some person should be authorized to take possession and charge of the same for the benefit of such absent person, the court may appoint an agent for that purpose, and authorize him to take charge of such estate as well as to act for such absent person in the distribution.

Statutes of 1851, p. 484, § 274.

Agent to give
bond, and his
compensa-
tion.

SEC. 1692. (§ 275.) The agent must give a bond to the probate judge, to be approved by him, conditioned that he shall faithfully manage and account for the estate, before he is authorized to receive the same; and the court appointing such agent may allow a reasonable sum out of the profits of the estate for his services and expenses.

Statutes of 1851, p. 484, § 275.

Unclaimed
estate, how
disposed of.

SEC. 1693. (§ 276.) When personal property remains in the hands of the agent unclaimed, and it appears to the court before an annual accounting that it is for the benefit of those interested, it shall be sold under the order of the court, and the proceeds, after deducting the expenses of the sale allowed by the court, must be paid into the state treasury. When the payment is made, the

agent must take from the treasury duplicate receipts, one of which he must file in the office of the controller and the other in the probate court.

Statutes of 1851, p. 484, § 276.

SEC. 1694. The agent must render to the probate court appointing him, annually, and account, showing—

When real and personal property of absentee to be sold.
N. S.

1. The value and character of the property received by him, what portion thereof is still on hand, what sold, and for what.

2. The income derived therefrom.

3. The taxes and assessments imposed thereon, for what, and whether paid or unpaid.

4. Expenses incurred in the care, protection and management thereof, and whether paid or unpaid.

When filed, the probate court may examine witnesses and take proofs in regard to the account; and if satisfied from such accounts and proofs that it will be for the benefit and advantage of the persons interested therein, the court may, by order, direct a sale to be made of the whole or such parts of the real or personal property as shall appear to be proper, and the purchase money to be deposited in the state treasury.

SEC. 1695. (§ 277.) The agent is liable on his bond for the care and preservation of the estate while in his hands, and for the payment of the proceeds of the sale as required in the preceding sections, and may be sued thereon by any person interested.

Liability of agent on his bond.

Statutes of 1851, p. 484, § 277.

SEC. 1696. (§ 278.) When any person appears and claims the money paid into the treasury, the probate court making the distribution must inquire into such claim, and being first satisfied of his right thereto, must grant him a certificate to that effect, under its seal; and upon the presentation of the certificate to him, the controller must draw his warrant on the treasurer for the amount.

Certificate to claimant.

Statutes of 1851, p. 484, § 278.

SEC. 1697. (§ 279.) When the estate has been fully administered, and it is shown by the executor or administrator, by the production of satisfactory vouchers, that he has paid all sums of money due from him, and deliv-

Final settlement, decree and discharge.

ered up, under the order of the court, all the property of the estate to the parties entitled, and performed all the acts lawfully required of him, the court must make a judgment or decree discharging him from all liability to be incurred thereafter.

Statutes of 1851, p. 484, § 279; 1861, p. 651, § 98.

Discovery of
property.

Sec. 1698. (§ 280.) The final settlement of an estate does not prevent the issuing of letters testamentary, or of administration with the will annexed, whenever other property of the estate is discovered, or whenever it becomes necessary or proper, from any cause, that letters should be again issued, but the same may be done in such contingency.

Statutes of 1851, p. 484, § 280; 1861, p. 651, § 99.

NOTE.—In rearranging this work, chapter 11 of Hittell and of Belknap have been placed in chapter 3 of this title, and constitutes article 10 thereof, and is of course omitted here, which makes the numbers of the chapters hereafter one less than in the old work.

This chapter is made in order to bring together all the law relating to executors and administrators particularly, and is considered an improvement for that reason.

CHAPTER XII.

OF ORDERS, DECREES, PROCESS, MINUTES, RECORDS, TRIALS AND APPEALS.

SECTION 1704. Orders and decrees to be entered in minutes.

1705. How often publication to be made.

1706. Recorded decree or order to impart notice from date of filing.

1707. Service of personal notice.

1708. Citation, how served. Proofs of publication, how made.

1709. Citation to be served five days before return.

1710. Clerk of probate court may administer oaths and issue citations.

1711. Writs to be signed and sealed.

1712. One description of real estate sought to be sold being published, is sufficient for all purposes.

1713. District court practice applicable.

1714. Issues joined in probate court, how tried and disposed of.

1715. Court to try case when no jury is demanded. How and what issues to be tried.

1716. Court to appoint attorney for minor or absent heirs, devisees, legatees or creditors, when, and what compensation he is to receive.

SECTION 1717. Decree relating to homestead, and effect thereof.

1718. Appeals may be taken to the supreme court, from what.

1719. Costs, by whom paid in certain cases.

1720. Executor, administrator or guardian to be removed when committed for contempt, and another appointed.

SEC. 1704. (§ 287.) All orders and decrees made by the probate court during its terms, and all orders which the probate judge is specially authorized to make out of term time or at chambers, must be entered at length in the minute book of the court. Upon the close of each term the judge must sign the minutes of the term and of all the intermediate proceedings.

Orders and decrees to be entered in minutes.

Statutes of 1851, p. 485, § 287.

SEC. 1705. (§ 287.) When any publication is ordered, such publication must be made daily or otherwise, as often during the prescribed period as the paper is regularly issued, unless otherwise provided in this title. The court or judge may, however, prescribe a less number of publications during the period prescribed.

How often publication to be made.

Statutes of 1861, p. 652, § 104.

SEC. 1706. When it is provided in this title that any order or decree of a probate court or judge, or a copy thereof, must be recorded in the office of the county recorder, from time of filing the same for record notice is imparted to all persons of the contents thereof.

Recorded decree or order to impart notice from date of filing.
N. S.

Statutes of 1851, p. 767, § 11.

NOTE.—This should be provided for in the civil code, if not done already.

SEC. 1707. (§ 288.) When personal notice is required in this title to be given to any party to a proceeding in the probate court, and no other mode of giving notice is prescribed, it must be given by citation, issued and signed by the clerk, and under the seal of the court, directed to the sheriff of the proper county, and requiring him to cite such persons to appear before the court or judge, at a time and place to be named in the citation, or addressed directly to the party to be cited, and served in like manner as a summons issued in a civil action. In the body of the citation must be briefly stated the nature or character of the proceedings.

Service of personal notice.

Statutes of 1851, p. 486, § 288; 1861, p. 652, § 105.

Citation,
how served.

SEC. 1708. (§ 289.) The officer to whom the citation is directed must serve it by delivering a copy to the person therein named, and must return the original to the court, according to its directions, indorsing thereon his certificate of the time and manner of service. All proofs of publication, or other mode of giving notice or serving papers, may be made by the affidavit of any person competent to be a witness, which must be filed, and is prima facie evidence of such publication or notice of service.

Statutes of 1851, p. 486, § 289 ; 1861, p. 653, § 106.

Citation to be
served five
days before
return.

SEC. 1709. (§ 290.) When no other time is specially prescribed in this title, citations must be served at least five days before the return day thereof.

Statutes of 1851, p. 486, § 290 ; 1861, p. 653, § 107.

Clerk of pro-
bate court
may admin-
ister oaths
and issue
citations.

SEC. 1710. (§ 291.) Unless otherwise specially prescribed, the clerk of the probate court may administer all oaths necessary and proper to be taken, touching any matter pending in the probate court, or in any manner connected with proceedings of which the court has jurisdiction, and issue citations and subpoenas upon the application of any party, without the order of the judge, except in cases in which such order is specially required.

Statutes of 1851, p. 486, § 291.

Writs to be
signed and
sealed.

SEC. 1711. (§ 292.) All writs and process issuing from the probate court must be signed by the clerk, and authenticated with the seal of the court, except subpoenas, notices and publications.

Statutes of 1851, p. 486, § 292 ; 1861, p. 653, § 108.

One descrip-
tion of real
estate sought
to be sold
being pub-
lished, is
sufficient for
all purposes.
N. S.

SEC. 1712. When a complete description of the real property of an estate sought to be sold has been given and published in a newspaper, as required in the order to show cause why the sale should not be made, such description need not be published in any subsequent notice of sale or notice of a petition for the confirmation thereof; it is sufficient to refer to the description contained in the publication of the first notice, as being proved and on file in the court.

NOTE.—The commission is indebted to Judge S. M. Bliss, of Yuba county, for this suggestion, as also for other aid in preparing this work.

SEC. 1713. (§ 293.) The practice in civil actions is applicable to proceedings in the probate court, so far as the same is not in conflict or not inconsistent with the provisions of this title.

District court practice applicable.

NORM.—The greater portion of section 293 (Stat. 1851, p. 486; 1861, p. 653, § 109) is omitted, being provided for in part IV.

SEC. 1714. (§ 294.) All issues of fact joined in the probate court must be tried in conformity with the requirements of article two, chapter two, of this title, and in all such proceedings the party affirming is plaintiff, and the one denying or avoiding is defendant. Judgments therein, on the issues joined, as well as for costs, may be entered and enforced by execution or otherwise, by the probate court, as in civil actions.

Issues joined in probate court, how tried and disposed of. N. S.

Statutes of 1851, p. 486, § 294; 1861, p. 653, § 110; 1867-8, p. 629, § 2.

NORM.—This section is modified so as to provide for trials in the probate court by jury, as in chapter 2.

SEC. 1715. (§ 294.) If no jury is demanded, the court must try the issues joined. If on written demand a jury is called by either party, and the issues are not sufficiently made up by the written pleadings on file, the court, on due notice to the opposite party, must settle and frame the issues to be tried and submit the same, together with the evidence of each party, to the jury, on which they must render a verdict. Either may move for a new trial upon the same grounds and errors, and in like manner, as provided in this code for civil actions.

Court to try case when no jury is demanded. How and what issues to be tried. N. S.

Statutes of 1851, p. 487, § 294; 1861, p. 654, § 110; 1867-8, p. 629, § 2.

SEC. 1716. (§ 295.) At or before the hearing of petitions and contests for the probate of wills; for letters testamentary or of administration; for sales of real estate and confirmations thereof; settlements, partitions and distributions of estates; setting apart homesteads; and all other proceedings where all the parties interested in the estate are required to be notified thereof, the court must appoint some competent attorney at law to represent, in all such proceedings, the devisees, legatees, heirs or creditors of the decedent, who are minors and have no

Court to appoint attorney for minor or absent heirs devisees, legatees or creditors, when, and what compensation he is to receive. N. S.

general guardian in the county, or who are non-residents of the state; and may, if he deem it necessary, appoint an attorney to represent those interested who, though they are neither such minors or non-residents, are unrepresented. The order must specify the names of the parties for whom the attorney is appointed, who is thereby authorized to represent such parties in all such proceedings had subsequent to his appointment. The appearance of the attorney is sufficient proof of the service of the notice on the parties he is appointed to represent. The attorney may receive from the distributive shares of the estate set apart for the parties whom he represents, a fee not exceeding fifty dollars for his entire services; if there is no distribution of the estate, this fee must be paid out of the funds of the estate as necessary expenses of administration. If, for any cause, it becomes necessary, the probate court may substitute another attorney for the one first appointed, in which case the fee must be proportionately divided.

Statutes of 1851, p. 450, §§ 18, 32, 159, 235, 295; 1861, p. 630, § 8; 1861, p. 441, § 56; 1861, p. 446, § 80; 1861, p. 654, § 111; 1870, p. 794, § 2.

NOTE.—This section supersedes the repetition of the provision for an attorney to be appointed by the court, which occurs in the numerous sections set out in the marginal note. Section 295 of the old work being embodied, is omitted entirely.

Decree relating to homestead, and effect thereof. N. S.

SEC. 1717. (§ 296.) When a judgment or decree is made, setting apart a homestead, confirming a sale, making distribution of real estate, or determining any other matter affecting the title to real estate, a certified copy of the same must be recorded in the office of the recorder of the county in which the land is situated. If the person entitled to the homestead or distribution is also executor or administrator, the recorded order of the probate court vests title thereto in such person, without a deed from the executor or administrator.

Statutes of 1851, p. 487, § 296; 1861, p. 654, § 112.

Appeals may be taken to the supreme court, from what.

SEC. 1718. (§ 297.) An appeal may be taken to the supreme court from an order, decree or judgment of the probate court, in all cases provided for in title thirteen,

chapter four, and also from an order granting or refusing a new trial.

Statutes of 1851, p. 487, § 297; 1861, p. 654, § 113.

NOTE.—The omission of section 298 (Stat. 1851, p. 487; 1855, p. 309, § 9) gives an appeal as in other civil actions, at any time within a year, except from orders as in other cases, which must be within sixty days. Sections 299, 300 and 301 (Stat. 1851, p. 487; 1855, p. 309, §§ 10, 11; 1861, p. 655, § 114) are omitted; their office is supplied in a preceding portion of this code.

SEC. 1719. (§ 302) When it is not otherwise prescribed in this title, the probate court, or the supreme court on appeal, may, in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require. Execution for the costs may issue out of the probate court.

Costs, by whom paid in certain cases.

Statutes of 1851, p. 487, § 302; 1855, p. 302, § 13.

SEC. 1720. Whenever an executor, administrator or guardian is committed for contempt, in disobeying any lawful order of the probate court or the judge thereof, and has remained in custody for thirty days without obeying such order, or purging himself otherwise of the contempt, the probate court may, by order reciting the facts, and without further showing or notice, revoke his letters and appoint some other person, entitled thereto, executor, administrator or guardian, in his stead.

Executor, administrator or guardian to be removed when committed for contempt, and another appointed. N. S.

CHAPTER XIII.

OF PUBLIC ADMINISTRATOR.

SECTION 1726. What estates to be administered by public administrator.

1727. Public administrator to obtain letters, when and how. His bond and oath.

1728. Duty of persons in whose house any stranger dies.

1729. Must return inventory and administer estates according to this title.

1730. When another person is appointed administrator or executor, public administrator to deliver up the estate.

1731. Civil officers to give notice of waste to public administrator.

1732. Suits for property of decedents.

1733. Order to examine party charged with embezzling estate.

1734. Punishment for refusing to attend.

1735. Order on public administrator to account.

SECTION 1736. Every six months to make and publish return of condition of estate.

1737. Not to be interested in the payments for or on account of estates in his hands.

1738. When to settle with county clerk, and how unclaimed estate disposed of.

1739. Proceedings, how and by whom instituted, against public administrator failing to pay over money as ordered.

1740. Fees of officers, when and by whom paid.

1741. Public administrator to administer oaths.

1742. Preceding chapters applicable to public administrator.

NOTE.—Section 303, Hittell, second volume, and of Balknap, provides punishment for wilful misdemeanor in office of the public administrator, and is transferred to the penal code. There will also be omitted from this chapter all sections relating to public administrator as an *office*, and of every other character not pertinent to the practice and proceedings in the probate court. Those matters omitted here will be found under appropriate heads in the civil and political codes.

What estates to be administered by public administrator. N. S.

SEC. 1726. (§ 3.) Every public administrator, duly elected, commissioned and qualified, must take charge of the estates of persons dying within his county, as follows:

1. Of decedents for whom no administrators are appointed, and which in consequence thereof is being wasted, uncared for or lost.

2. Of decedents who leave no known heirs, or are strangers.

3. Of those ordered into his hands by the probate court; and,

4. Of those for which letters of administration have been issued to him by the probate court.

Statutes of 1851, p. 207, § 3; 1860, p. 105, § 3.

Public administrator to obtain letters, when and how. N. S.

SEC. 1727. Whenever a public administrator takes charge of an estate, which he is entitled to administer without letters of administration being issued, or under order of the court, he must, with all convenient dispatch, procure letters of administration thereon, in like manner and on like proceedings as letters of administration are issued to other persons. His official bond and oath is in lieu of the administrator's bond and oath, but when real estate is ordered to be sold, another bond may be required by the court.

His bond and oath.

SEC. 1728. (§ 304.) Whenever a stranger, or person

without known heirs, dies intestate in the house or premises of another, leaving property, such person, or any one knowing the facts, must give immediate notice thereof to the public administrator of the county; and in default thereof he is liable for any damage that may be sustained thereby, to be recovered by the public administrator, or any party interested.

Duty of persons in whose house any stranger dies

Statutes of 1851, p. 488, § 304.

Sec. 1729. (§ 305.) The public administrator must make and return a perfect inventory of all estates taken into his possession, administer and account for the same as near as circumstances will permit, according to the provisions of this title prescribing the duties of administrators, subject to the control and direction of the probate court.

Must return inventory and administer estates according to this title.

Statutes of 1851, p. 488, § 305.

Sec. 1730. (§ 306.) If, at any time, letters testamentary or of administration are regularly granted to any other person on an estate of which the public administrator has charge, he must, under the order of the probate court, account for, pay and deliver to the executor or administrator thus appointed, all the money, property, papers and estate of every kind, in his possession or under his control.

When another person is appointed administrator or executor, public administrator to deliver up the estate

Statutes of 1851, p. 488, § 306.

Sec. 1731. (§ 307.) All civil officers must inform the public administrator of all property and estate known to them, belonging to a decedent, which is liable to loss, injury or waste, and which, by reason thereof, ought to be in the possession of the public administrator.

Civil officers to give notice of waste to public administrator.

Statutes of 1851, p. 488, § 307.

Sec. 1732. (§ 308.) The public administrator must institute all suits and prosecutions necessary to recover the property, debts, papers or other estate of the decedent.

Suits for property of decedents.

Statutes of 1851, p. 488, § 308.

Sec. 1733. (§ 309.) When the public administrator complains to the probate judge, on oath, that any person has concealed, embezzled or disposed of, or has in his possession, any money, goods, property or effects, to the possession of which he is entitled in his official capacity, the

Order to examine party charged with embezzling estate.

judge may cite such person to appear before the probate court, and examine him on oath touching the matter of such complaint.

Statutes of 1851, p. 488, § 309.

Punishment
for refusing
to attend.

SEC. 1734. (§ 310.) If the person so cited refuses to appear and submit to such an examination, or to answer such interrogatories as may be put to him touching the matter of such complaint, the court may commit him to the county jail, there to remain in close custody until he submits to the order of the court. All such interrogatories and answers must be reduced to writing and signed by the party examined, and filed in the probate court.

Statutes of 1851, p. 488, § 310.

Order on
public ad-
ministrator
to account

SEC. 1735. (§ 311.) The probate court may at any time order the public administrator to account for and deliver all the money and property of an estate in his hands to the heirs, or to the executors or administrators regularly appointed.

Statutes of 1851, p. 488, § 311.

Every six
months to
make and
publish
return of
condition of
estate

SEC. 1736. (§ 312.) The public administrator must, once in every six months, make to the probate judge, under oath, a return of all estates of decedents which have come into his hands, the value of the same, the expenses, if any, paid thereon, and the balance, if any, remaining in his hands; publish the same six times in some newspaper in the county, or if there be none, then it must be posted, legibly written or printed, in the office of the county clerk of the county; and after a final settlement of the affairs of any estate, if there be no heirs or other claimants thereof, must pay over to the county treasurer, to be paid into the state treasury, all moneys and effects in his hands belonging to the estate, and if any such moneys and effects escheat to the state, they must be disposed of as other escheated estates.

Statutes of 1851, p. 207, § 5; 1855, p. 299, § 2.

Not to be
interested in
payments for
or on account
of estates in
his hands.
N. E.

SEC. 1737. (§ 302.) The public administrator must not be interested in expenditures of any kind made on account of any estate in his hands as such; nor must he be associated in business or otherwise, with any one who is so interested, and he must attach to his report and publi-

ation, made in accordance with the preceding section, his affidavit to the facts in this section required.

Statutes of 1851, p. 414, § 4.

Sec. 1738. (§ 302.) Public administrators are required to settle and adjust their accounts, relating to the care and disbursement of money or property belonging to estates in their hands, under oath, with the county clerks of their respective counties, on the first Monday in each month; and they must pay to the county treasurer any money remaining in their hands of an estate unclaimed, as provided in sections sixteen hundred and ninety-three to sixteen hundred and ninety-six, both inclusive.

When to settle with county clerk, and how unclaimed estate disposed of.
N. S.

Statutes of 1853, p. 211, § 2.

Sec. 1739. When it appears, from the returns made in pursuance of the foregoing sections, that any money remains in the hands of the public administrator (after a final settlement of the estate) unclaimed, which should be paid over to the county treasurer, the probate judge must order the same to be paid over to the county treasurer, and, on failure of the public administrator to comply with the order within ten days after the same is made, the district attorney for the county must immediately institute the requisite legal proceedings against the public administrator, for a judgment against him, and the sureties on his official bond, in the amount of money so withheld, and costs.

Proceedings, how and by whom instituted against public administrator failing to pay over money as ordered.

Statutes of 1859, p. 213, § 1.

Sec. 1740. (§ 305.) The fees of all officers chargeable to estates in the hands of public administrators must be paid out of the assets thereof so soon as the same come into his hands.

Fees of officers, when and by whom paid.
N. S.

Statutes of 1860, p. 357, §§ 1, 2.

Sec. 1741. (§ 305.) Public administrators may administer oaths in regard to all matters touching the discharge of their duties, or the administration of estates in their hands.

Public administrator to administer oaths.
N. S.

Statutes of 1860, p. 357, § 3.

Sec. 1742. When no direction is given in this chapter for the government or guidance of a public administrator

Preceding chapters applicable to public administrator.
N. S.

in the discharge of his duties, or for the administration of an estate in his hands, the provisions of the preceding chapters of this title are fully applicable, and must govern.

CHAPTER XIV.

OF GUARDIAN AND WARD.

ARTICLE I. GUARDIANS OF MINORS.

II. GUARDIANS OF INSANE AND INCOMPETENT PERSONS.

III. THE POWERS AND DUTIES OF GUARDIANS.

IV. THE SALE OF PROPERTY AND DISPOSITION OF PROCEEDS.

V. NON-RESIDENT GUARDIANS AND WARDS.

VI. GENERAL AND MISCELLANEOUS PROVISIONS.

ARTICLE I.

GUARDIANS OF MINORS.

SECTION 1747. Probate judge to appoint guardians, when, and on what petition.

1748. When minor may nominate guardian ; when not.

1749. When appointment may be made by judge, when minor is over fourteen.

1750. Nomination by minors after arriving at fourteen.

1751. Minor having no father or mother.

1752. Powers and duties of guardian.

1753. Bond of guardian, conditions of.

1754. Probate judge may insert conditions in order appointing guardian.

1755. Letters of guardianship and bond of guardian to be recorded.

1756. Maintenance of minor out of income of his own property.

1757. Guardian to give bond. Powers limited.

1758. Power of courts to appoint guardians and next friend not impaired.

Probate
judge to ap-
point guar-
dians, when,
and on what
petition.

SEC. 1747. (§§ 1, 336.) The probate judge of each county, when it appears necessary or convenient, may appoint guardians for the persons and estates, or either of them, of minors, who have no guardian legally appointed by will, and who are inhabitants or residents in the same county, or who reside without the state and have estate within the county. Such appointment may be made on the petition of a relative or other person, in behalf of such minor. Before making the appointment, the judge must cause such notice to be given to the rela-

tives of the minor residing in the county, and to any person under whose care such minor may be, as he deems reasonable.

Statutes of 1850, p. 268, § 1; 1861, p. 603, § 1; 4 Cal. 362; 15 Cal. 227.

SEC. 1748. (§§ 2, 337.) If the minor is under the age of fourteen years, the probate judge may nominate and appoint his guardian. If he is above the age of fourteen years, he may nominate his own guardian, who, if approved by the judge, must be appointed accordingly.

When minor may nominate guardian; when not.

Statutes of 1850, p. 269, § 2.

SEC. 1749. (§§ 3, 338.) If the guardian nominated by the minor is not approved by the judge, or if the minor resides out of the state, or if, after being duly cited by the judge, he neglects for ten days to nominate a suitable person, the judge may nominate and appoint the guardian, in the same manner as if the minor were under the age of fourteen years.

When appointment may be made by judges, when minor is over 14.

Statutes of 1850, p. 269, § 3.

SEC. 1750. (§§ 4, 339.) When a guardian has been appointed by the court for a minor under the age of fourteen years, the minor, at any time after he attains that age, may appoint his own guardian, subject to the approval of the probate judge.

Nomination by minors after arriving at 14.

Statutes of 1850, p. 269, § 4.

NOTE.—Section 340 (Bolknap) omitted and placed in the civil code. It simply declares parents, not unsuitable therefor, to be guardians.

SEC. 1751. (§§ 6, 341.) If the minor has no father or mother living, competent to have the custody and care of his education, the guardian appointed shall have the custody and tuition of his ward.

Minor having no father or mother.

Statutes of 1850, p. 269, § 6.

SEC. 1752. (§§ 7, 342.) Every guardian appointed shall have the custody and tuition of the minor, and the care and management of his estate, until such minor arrives at the age of majority or marries, or until the guardian is legally discharged.

Powers and duties of guardian.

Statutes of 1850, p. 269, § 7.

Bond of
guardian,
conditions of.

Sec. 1753. (§§ 8, 343.) Before the order appointing any person guardian under this chapter takes effect, and before letters issue, the judge must require of such person a bond to the minor, with sufficient sureties, to be approved by the judge, and in such sum as he shall order, conditioned that the guardian will faithfully execute the duties of his trust according to law; and the following conditions shall form a part of such bond without being expressed therein:

1. To make an inventory of all the estate, real and personal, of his ward, that comes to his possession or knowledge, and to return the same within such time as the judge may order.

2. To dispose of and manage the estate according to law and for the best interest of the ward, and faithfully to discharge his trust in relation thereto, and also in relation to the care, custody and education of the ward.

3. To render an account, on oath, of the property, estate and moneys of the ward in his hands, and all proceeds or interests derived therefrom, and of the management and disposition of the same, within three months after his appointment, and at such other times as the court directs, and at the expiration of his trust to settle his accounts with the probate judge, or with the ward, if he be of full age, or his legal representatives, and to pay over and deliver all the estate, moneys and effects remaining in his hands, or due from him on such settlement, to the person or persons who are lawfully entitled thereto.

Upon filing the bond, duly approved, letters of guardianship must issue to the person appointed. In form, the letters of guardianship must be substantially the same as letters of administration; and the oath of the guardian must be indorsed thereon, that he will perform the duties of his office, as such guardian, according to law.

Statutes of 1861, p. 604, § 2.

Probate
judge may
insert con-
ditions in
order ap-
pointing
guardian.

Sec. 1754. (§§ 1, 342.) When any person is appointed guardian of a minor, the probate judge may, with the consent of such person, insert in the order of appointment conditions not otherwise obligatory, providing for the care, treatment, education and welfare of the minor; and to perform such conditions is a part of the duties of

the guardian, for the faithful performance of which, he and the sureties on his bond are responsible.

Statutes of 1866, p. 380, § 1.

Sec. 1755. (§§ 15, 385.) All letters of guardianship issued, and all guardians' bonds executed under the provisions of this chapter, with the affidavits and certificates thereon, must be recorded by the clerk of the probate court having jurisdiction of the persons and estates of the wards, respectively, in a book kept by him in his office for that purpose.

Letters of guardianship and bond of guardian to be recorded.

Statutes of 1861, p. 607, § 15.

NOTE.—The last portion of the original section being on the subject of evidence, is omitted, as it is fully provided for under the head of "Evidence." Section 343 (Belknap) is omitted here because the last section of this chapter covers the ground.

Sec. 1756. (§§ 9, 344.) If any minor having a father living has property, the income of which is sufficient for his maintenance and education in a manner more expensive than his father can reasonably afford, regard being had to the situation of the father's family and to all the circumstances of the case, the expenses of the education and maintenance of such minor may be defrayed out of the income of his own property, in whole or in part, as judged reasonable, and must be directed by the probate court; and the charges therefor may be allowed accordingly, in the settlement of the accounts of his guardian.

Maintenance of minor out of income of his own property.

Statutes of 1850, p. 269, § 9.

Sec. 1757. (§§ 10, 345.) Every testamentary guardian must give bond and qualify, and has the same powers and must perform the same duties, with regard to the person and estate of his ward, as guardians appointed by the probate court, except so far as their powers and duties are legally modified, enlarged or changed by the will by which such guardian was appointed.

Guardian to give bond.

Powers limited.

Statutes of 1861, p. 604, § 3.

Sec. 1758. (§§ 11, 346.) Nothing contained in this chapter affects or impairs the power of any court to appoint a guardian to defend the interests of any minor interested in any suit or matter pending therein; nor to appoint or

Power of courts to appoint guardians and next friend not impaired

allow any person, as the next friend of a minor, to commence and prosecute any suit in his behalf.

Statutes of 1850, p. 269, § 11.

ARTICLE II.

GUARDIANS OF INSANE AND INCOMPETENT PERSONS.

SECTION 1763. Guardians of insane and other incompetent persons.

1764. Appointment by probate judge after hearing.

1765. Powers and duties of such guardians.

Guardians of
insane and
other incom-
petent per-
sons.

SEC. 1763. (§§ 12, 347.) When it is represented to the probate judge, upon verified petition of any relative or friend, that any person is insane, or, from any cause, mentally incompetent to manage his property, the judge must cause a notice to be given to the supposed insane or incompetent person, of the time and place of hearing the case, not less than five days before the time so appointed, and such person, if able to attend, must be produced before him on the hearing.

Statutes of 1850, p. 269, § 12.

Appointm't
by probate
judge after
hearing

SEC. 1764. (§§ 13, 348.) If, after a full hearing and examination upon such petition, it appears to the probate judge that the person in question is incapable of taking care of himself and managing his property, he must appoint a guardian of his person and estate, with the powers and duties in this chapter specified.

Statutes of 1850, p. 270, § 13.

Powers and
duties of such
guardians.

SEC. 1765. (§§ 14, 349.) Every guardian appointed, as provided in the preceding section, must have the care and custody of the person of his ward, and the management of all his estate, until such guardian is legally discharged; and he must give bond to such ward, in like manner and with like conditions as before prescribed with respect to the guardian of a minor.

Statutes of 1850, p. 270, § 14.

ARTICLE III.

THE POWERS AND DUTIES OF GUARDIANS.

- SECTION 1768.** Guardian to pay debts of ward out of ward's estate.
 1769. Guardian to recover debts due his ward and represent him.
 1770. Guardian to manage his estate, maintain ward and sell real estate.
 1771. Maintenance, support and education of ward, how enforced.
 1772. May assent to a partition of real estate.
 1773. Guardian to return inventory of estate of ward. Appraisers to be appointed. Like proceedings when other property acquired.
 1774. Settlements of guardians.
 1775. Allowance of accounts of joint guardians.
 1776. Expenses and compensation of guardians.

SEC. 1768. (§§ 15, 350.) Every guardian appointed under the provisions of this chapter, whether for a minor or any other person, must pay all just debts due from the ward, out of his personal estate and the income of his real estate, if sufficient; if not, then out of his real estate, upon obtaining an order for the sale thereof, and disposing of the same in the manner provided in this title for the sale of real estate of decedents.

Guardian to pay debts of ward out of ward's estate

Statutes of 1850, p. 270, § 15.

SEC. 1769. (§§ 16, 351.) Every guardian must settle all accounts of the ward, and demand, sue for and receive all debts due to him, or may, with the approbation of the probate judge, compound for the same and give discharges to the debtors on receiving a fair and just dividend of his estate and effects; and he must appear for and represent his ward in all legal suits and proceedings, unless another person is appointed for that purpose as guardian or next friend.

Guardian to recover debts due his ward and represent him

Statutes of 1850, p. 270, § 16.

SEC. 1770. (§§ 17, 352.) Every guardian must manage the estate of his ward frugally and without waste, and apply the income and profits thereof, as far as may be necessary, for the comfortable and suitable maintenance and support of the ward and his family, if there be any; and if such income and profits be insufficient for that purpose, the guardian may sell the real estate, upon obtaining an order of the court therefor, as provided, and must apply the proceeds of such sale, as far as may be neces-

Guardian to manage his estate, maintain ward and sell real estate.

sary, for the maintenance and support of the ward and his family, if there be any.

Statutes of 1850, p. 270, § 17.

Maintenance
support and
education of
ward, how
enforced.
N. S.

SEC. 1771. When a guardian has advanced for the necessary maintenance, support or education of his ward, an amount not disproportionate to the value of his estate or his condition of life, and the same is made to appear to the satisfaction of the court, by proper vouchers and proofs, the guardian must be allowed credit therefor in his settlements. Whenever a guardian fails, neglects or refuses to furnish suitable and necessary maintenance, support or education for his ward, the court may order him to do so, and enforce such order by proper process. Whenever any third person, at his request, supplies a ward with such suitable and necessary maintenance, support or education, and it is shown to have been done after refusal or neglect of the guardian to supply the same, the court may direct the guardian to pay therefor out of the estate, and enforce such payment by due process.

. NOTE.—At the January term, 1871, of the supreme court, in the case of *Swift vs. Swift*, it was held that the probate practice act did not provide a remedy against the guardian for not supplying necessities to his ward, except by action on his bond. The learned Judge Crockett says : “It is evidently a *casus omisus* in the statute.” This section is inserted here to supply the omission.

May assent
to a partition
of real estate

SEC. 1772. (§§ 18, 353.) The guardian may join in and assent to a partition of the real estate of the ward, wherever such assent may be given by any person.

Statutes of 1850, p. 270, § 18.

Guardian
to return
inventory
of estate of
ward.

SEC. 1773. (§§ 19, 354.) Every guardian must return to the probate court an inventory of the estate of his ward within three months after his appointment, and annually thereafter. When the value of the estate exceeds the sum of one hundred thousand dollars, semi-annual returns must be made to the probate court. The probate court must, upon application made for that purpose by any person interested in the estate of, or of kin or related to, any ward, compel the guardian to render an account to the probate court of the estate of his ward. The inventories and accounts so to be returned or rendered must be sworn to by the guardian, and by all, when-

ever there are more than one guardian of any one ward. All the estate of the ward described in the first inventory must be appraised by appraisers appointed, sworn and acting in the manner provided for regulating the settlement of the estate of decedents; such inventory, with the appraisement of the property therein described, must be recorded by the clerk of the probate court in a proper book kept in his office for that purpose. Whenever any other property of the estate of any ward is discovered, not included in the inventory of the estate already returned, and whenever any other property may be succeeded to, or be acquired by or for the benefit of any ward, the like proceedings must be had for the return and appraisement thereof that are herein provided in relation to the first inventory and return.

Appraisers to
be appointed

Like pro-
ceedings
when other
property
acquired.

Statutes of 1870, p. 791, § 1.

SEC. 1774. (§§ 35, 370.) The guardian must, upon the expiration of a year from the time of his appointment, and as often thereafter as he may be required, present his account to the probate court for settlement and allowance.

Settlements
of guardians.

Statutes of 1850, p. 271, § 35.

SEC. 1775. (§§ 49, 384.) When an account is rendered by two or more joint guardians, the probate judge may, in his discretion, allow the same upon the oath of any of them.

Allowance of
accounts of
joint guar-
dians.

Statutes of 1850, p. 273, § 49.

SEC. 1776. (§§ 47, 382.) Every guardian must be allowed the amount of his reasonable expenses incurred in the execution of his trust, and he must also have such compensation for his services as the court in which his accounts are settled deems just and reasonable.

Expenses
and com-
pensation of
guardians.

Statutes of 1850, p. 273, § 47.

ARTICLE IV.

THE SALE OF PROPERTY AND DISPOSITION OF THE PROCEEDS.

SECTION 1780. May sell property in certain cases.

1781. Sale of real estate to be made upon order of court.

1782. Application of proceeds of sales.

SECTION 1783. Investment of proceeds of sales.

1784. Order for sale, how obtained.

1785. Notice to next of kin, how given.

1786. Copy of order to be served, published or consent filed.

1787. Hearing of application.

1788. Who may be examined on such hearing.

1789. Costs to be awarded, to whom.

1790. Order of sale, to specify what.

1791. Bond before selling.

1792. All proceedings for sales of property by guardians to conform to chapter seven of this title.

1793. Limit of order of sale.

1794. Conditions of sales of real estate of minor heirs. Bond and mortgage to be given for deferred payments.

1795. Probate court may order the investment of money of the ward.

May sell
property in
certain cases.

SEC. 1780. (§§ 20, 355.) When the income of an estate under guardianship is insufficient to maintain the ward and his family, or to maintain and educate the ward when a minor, his guardian may sell his real or personal estate for that purpose, upon obtaining an order therefor.

Statutes of 1861, p. 605, § 5.

Sale of real
estate to be
made upon
order of
court.

SEC. 1781. (§§ 21, 356.) When it appears to the satisfaction of the court, upon the petition of the guardian, that for the benefit of his ward his real estate, or some part thereof, should be sold, and the proceeds thereof put out at interest, or invested in some productive stock, or in the improvement or security of any other real estate of the ward, his guardian may sell the same for such purpose, upon obtaining an order therefor.

Statutes of 1861, p. 605, § 6.

Application
of proceeds
of sales.

SEC. 1782. (§§ 22, 357.) If the estate is sold for the purposes mentioned in this article, the guardian must apply the proceeds of the sale to such purposes, as far as necessary, and put out the residue, if any, on interest, or invest it in the best manner in his power, until the capital is wanted for the maintenance of the ward and his family, or the education of his children, or for the education of the ward when a minor, in which case the capital may be used for that purpose, as far as may be necessary, in like manner as if it had been personal estate of the ward.

Statutes of 1850, p. 270, § 22.

Sec. 1783. (§§ 23, 358) If the estate is sold for the purpose of putting out or investing the proceeds, the guardian must make the investment according to his best judgment, or in pursuance of any order that may be made by the probate court.

Investment
of proceeds
of sales.

Statutes of 1850, p. 270, § 23.

Sec. 1784. (§§ 24, 359.) To obtain an order for such sale, the guardian must present to the probate court of the county in which he was appointed guardian, a verified petition therefor, setting forth the condition of the estate of his ward, and the facts and circumstances on which the petition is founded, tending to show the necessity or expediency of a sale.

Order for
sale, how
obtained.

Statutes of 1850, p. 271, § 24; 20 Cal. 352.

Sec. 1785. (§§ 25, 360.) If it appears to the court or judge, from the petition, that it is necessary or would be beneficial to the ward that the real estate, or some part of it, should be sold, or that the real and personal estate should be sold, the court or judge must thereupon make an order directing the next of kin of the ward, and all persons interested in the estate, to appear before the court, at a time and place therein specified, not less than four nor more than eight weeks from the time of making such order, to show cause why an order should not be granted for the sale of such estate. If it appear that it is necessary or would be beneficial to the ward to sell the personal estate or some part of it, the court must order the sale to be made.

Notice to
next of kin,
how given.

Statutes of 1861, p. 605, § 7.

Sec. 1786. (§§ 26, 361.) A copy of the order must be personally served on the next of kin of the ward, and on all persons interested in the estate, at least fourteen days before the hearing of the petition, or must be published at least three successive weeks in a newspaper printed in the county; or, if there be none printed in the county, then in such newspaper as may be specified by the court or judge in the order. If written consent to making the order of sale is subscribed by all persons interested therein, and the next of kin, notice need not be served or published.

Copy of order
to be served,
published
or consent
filed.

Statutes of 1861, p. 606, § 9.

Hearing of
application.

Sec. 1787. (§§ 27, 362.) The probate court, at the time and place appointed in the order, or such other time to which the hearing is postponed, upon proof of the service or publication of the order, must hear and examine the proofs and allegations of the petitioner and of the next of kin, and of all other persons interested in the estate who oppose the application.

Statutes of 1861, p. 606, § 9.

Who may be
examined on
such hearing

Sec. 1788. (§§ 28, 363.) On the hearing the guardian may be examined on oath, and witnesses may be produced and examined by either party, and process to compel their attendance and testimony may be issued by the probate court or judge, in the same manner and with like effect as in other cases provided for in this title.

Statutes of 1861, p. 606, § 10.

Costs to be
awarded, to
whom.

Sec. 1789. (§§ 29, 364.) If any person appears and objects to the granting of any order prayed for under the provisions of this article, and it appears to the court that either the petition or the objection thereto is sustained, the court may, in granting or refusing the order, award costs to the party prevailing, and enforce the payment thereof.

Statutes of 1850, p. 271, § 29.

Order of sale,
to specify
what.

Sec. 1790. (§§ 30, 365.) If, after a full examination, it appears necessary, or for the benefit of the ward, that his real estate or some part thereof should be sold, the court may grant an order therefor, specifying therein the causes or reasons why the sale is necessary or beneficial, and may, if the same has been prayed for in the petition, order such sale to be made either at public or private sale.

Statutes of 1861, p. 606, § 11.

Bond before
selling.

Sec. 1791. (§§ 31, 366.) Every guardian authorized to sell real estate must, before the sale, give bond to the probate judge, with sufficient surety to be approved by him, with condition to sell the same in the manner, and to account for the proceeds of the sale, as provided for in this chapter and chapter seven of this title.

Statutes of 1850, p. 271, § 31.

Sec. 1792. (§§ 32, 367.) All the proceedings of guardians in petitioning for sales of property of their wards, giving notice and the hearing of such petitions, granting or refusing the order of sale, directing the sale to be made at public or private sale, re-selling same property, return of sale and application for confirmation thereof, notice and hearing of such application, making orders rejecting or confirming sales and reports of sales, ordering and making conveyances of property sold, accounting and the settlement of accounts, must be had and made as required by the provisions of this title concerning estates of decedents, unless otherwise specially provided in this chapter.

All proceedings for sales of property by guardians to conform to chapter 7 of this title.
N. 8.

Statutes of 1850, p. 271, §§ 31, 32; 1861, p. 605, § 7;
1861, p. 606, § 11; 1850, p. 271, § 35.

Sec. 1793. (§§ 33, 368.) No order of sale, granted in pursuance of this article, continues in force more than one year after granting the same, without a sale being had.

Limit of order of sale.

Statutes of 1861, p. 606, § 12.

Sec. 1794. (§§ 50, 385.) All sales of real estate of wards must be for cash, or for part cash and part deferred payments, not to exceed three years, bearing date from date of sale, as, in the discretion of the probate judge, is most beneficial to the ward. Guardians making sales must demand and receive from the purchasers bond and mortgage on the real estate sold, with such additional security as the judge deems necessary and sufficient to secure the faithful payment of the deferred payments and the interest thereon.

Conditions of sales of real estate of minor heirs.

Bond and mortgage to be given for deferred payments.

Statutes of 1853, p. 129, § 1.

Sec. 1795. (§§ 36, 371.) The probate court, on the application of a guardian, or any person interested in the estate of any ward, after such notice to persons interested therein as the probate judge shall direct, may authorize and require the guardian to invest the proceeds of sales, and any other of his ward's money in his hands, in real estate, or in any other manner most to the interest of all concerned therein; and the probate court may make such other orders and give such directions as are needful for the management, investment and disposition of the estate and effects, as circumstances require.

Probate court may order the investment of money of the ward.

Statutes of 1861, p. 606, § 13.

ARTICLE V.

NON-RESIDENT GUARDIANS AND WARDS.

SECTION 1800. Guardians of non-resident persons.

1801. Powers and duties of guardians appointed under preceding section.

1802. Such guardians to give bonds.

1803. To what guardianship shall extend.

1804. Removal of non-resident ward's property.

1805. Proceedings on such removal.

1806. Discharge of person in possession.

Guardians of
non-resident
persons.

SEC. 1800. (§§ 43, 378.) When a person liable to be put under guardianship, according to the provisions of this chapter, resides without this state, and has estate therein, any friend of such person, or any one interested in his estate, in expectancy or otherwise, may therefor apply to the probate judge of any county in which there is any estate of such absent person; and if, after notice given to all interested, in such manner as the judge orders, by publication or otherwise, and a full hearing and examination, it appears proper, a guardian for such absent person may be appointed.

Statutes of 1861, p. 607, § 14; 19 Cal. 629.

Powers and
duties of
guardians
appointed
under pre-
ceding sec-
tion.

SEC. 1801. (§§ 44, 379.) Every guardian, appointed under the preceding section, has the same powers and performs the same duties, with respect to the estate of the ward found within this state, and with respect to the person of the ward, if he shall come to reside therein, as are prescribed with respect to any other guardian appointed under this chapter.

Statutes of 1850, p. 272, § 44.

Such guar-
dians to give
bonds.

SEC. 1802. (§§ 45, 380.) Every guardian must give bond to the ward, in the manner and with the like conditions as hereinbefore provided for other guardians, except that the provisions respecting the inventory, the disposal of the estate and effects, and the account to be rendered by the guardian, must be confined to such estate and effects as come to his hands in this state.

Statutes of 1850, p. 272, § 45.

To what
guardian-
ship shall
extend.

SEC 1803. (§§ 46, 381.) The guardianship which is first lawfully granted, of any person residing without this state, extends to all the estate of the ward within the

same, and excludes the jurisdiction of the probate court of every other county.

Statutes of 1850, p. 273, § 46.

Sec. 1804. (§§ 1, 386.) When the guardian and ward are both non-residents, and the ward is entitled to property in this state which may be removed to another state or foreign country without conflict with any restriction or limitation thereupon, or impairing the right of the ward thereto, such property may be removed to the state or foreign country of the residence of the ward, upon the application of the guardian to the probate judge of the county in which the estate of the ward, or the principal part thereof, is situated.

Removal of
non-resident
ward's prop-
erty.

Statutes of 1858, p. 59, § 1.

Sec. 1805. (§§ 2, 387.) The guardian must produce a transcript from the records of a court of competent jurisdiction, certified according to the laws of this state, or a certificate of a court having a seal, with the seal affixed, showing that he has been appointed guardian of the ward in the state or foreign country in which he and the ward reside, and has qualified as such according to the laws thereof, and gave bond with sureties for the performance of his trust, or if no bond is required by the laws of such other state or foreign country, a certificate showing such fact, and that the guardian has complied with all the prerequisites to taking possession of his ward's estate, over the seal of a court of competent jurisdiction; and must also give ten days notice to the resident executor, administrator or guardian, if there be such, of the intended application; thereupon, if good cause be not shown to the contrary, the probate judge must make an order granting to such guardian leave to take and remove the property of his ward to the state or place of his residence, which is authority to him to sue for and receive the same in his own name, for the use and benefit of his ward.

Proceedings
on such
removal.

Statutes of 1858, p. 59, § 2.

NOTE.—This section is so amended as to obviate any obstacle to removing estates to foreign countries, when no bonds are required of guardians by the laws thereof.

Sec. 1806. (§§ 3, 388.) Such order is a discharge of the executor, administrator, guardian or other person in whose

Discharge
of person in
possession.

possession the property may be at the time the order is made, on filing with the probate court the receipt therefor of the guardian of such absent ward.

Statutes of 1858, p. 59, § 3.

ARTICLE VI.

GENERAL AND MISCELLANEOUS PROVISIONS.

SECTION 1810. Examination of persons suspected of defrauding wards or concealing property.

1811. Removal and resignation of guardian, and surrender of estate.

1812. Guardianship, how terminated.

1813. New bond, when required.

1814. Guardian's bond to be filed. Action on.

1815. Limitation of actions on guardian's bond.

1816. Limitation of actions for the recovery of property sold.

1817. More than one guardian of a person may be appointed.

1818. Power of probate judge in chambers.

1819. Provisions of section ten hundred and fifty-seven apply to guardians.

Examination
of persons
suspected of
defrauding
wards or
concealing
property.

SEC. 1810. (§§ 42, 377.) Upon complaint made to him by any guardian, ward, creditor or other person interested in the estate, or having a prospective interest therein as heir or otherwise, against any one suspected of having concealed, embezzled or conveyed away any of the money, goods or effects, or an instrument in writing, belonging to the ward or to his estate, the probate judge may cite such suspected person to appear before him, and may examine and proceed with him on such charge in the manner provided in this title with respect to persons suspected of, and charged with, concealing or embezzling the effects of a decedent.

Statutes of 1850, p. 272, § 42.

Removal and
resignation
of guardian,
and surren-
der of estate.

SEC. 1811. (§§ 37, 372.) When a guardian, appointed either by the testator or the probate judge, becomes insane or otherwise incapable of discharging his trust, or unsuitable therefor, or has wasted or mismanaged the estate, or failed, for thirty days, to render an account or make a return, the probate court may, upon such notice to the guardian as the court may require, remove him and compel him to surrender the estate of the ward to the person found to be lawfully entitled thereto. Every guardian

may resign, when it appears proper to allow the same; and upon the resignation or removal of a guardian, as herein provided, the probate court or the judge thereof may appoint another in the place of the guardian who resigned or was removed.

Statutes of 1870, p. 792, § 2.

SEC. 1812. (§§ 38, 373.) The marriage of a minor ward terminates the guardianship; and the guardian of an insane or other person may be discharged by the probate judge when it appears to him, on the application of the ward or otherwise, that the guardianship is no longer necessary.

Guardian-
ship, how
terminated.

Statutes of 1850, p. 272, § 38.

SEC. 1813. (§§ 39, 374.) The probate judge may require a new bond to be given by a guardian whenever he deems it necessary, and may discharge the existing sureties from further liability, after due notice given as he may direct, when it shall appear that no injury can result therefrom to those interested in the estate.

New bond,
when re-
quired.

Statutes of 1850, p. 272, § 39.

SEC. 1814. (§§ 40, 375.) Every bond given by a guardian must be filed and preserved in the office of the clerk of the probate court of the county; and in case of a breach of a condition thereof, may be prosecuted for the use and benefit of the ward or of any person interested in the estate.

Guardian's
bond to be
filed.

Action on.

Statutes of 1850, p. 272, § 40.

SEC. 1815. (§§ 41, 376.) No action can be maintained against the sureties on any bond given by a guardian unless it be commenced within three years from the discharge or removal of the guardian; but if at the time of such discharge the person entitled to bring such action is under any legal disability to sue, the action may be commenced at any time within three years after such disability is removed.

Limitation
of actions on
guardian's
bond.

Statutes of 1850, p. 272, § 41.

NOTE.—This section modifies section 352 of this code, in its application to actions on guardians' bonds; and so does the next section, as to actions for recovery of estate sold.

Limitation
of actions for
the recovery
of property
sold.

SEC. 1816. (§§ 37, 369.) No action for the recovery of any estate, sold by a guardian, can be maintained by the ward, or by any person claiming under him, unless it is commenced within three years next after the termination of the guardianship, or when a legal disability to sue exists by reason of minority or otherwise, at the time when the cause of action accrues, within three years next after the removal thereof.

Statutes of 1850, p. 271, § 34.

More than
one guardian
of a person
may be ap-
pointed.

SEC. 1817. (§§ 48, 383.) The court, in its discretion, whenever necessary, may appoint more than one guardian of any person subject to guardianship, who must give bond and be governed and liable in all respects as provided for a sole guardian in this chapter.

Statutes of 1850, p. 273, § 48.

NOTE.—The entire act of 1858, p. 98, authorizing the employment of counsel in land cases, etc., is omitted as unnecessary, since the whole subject of the act is covered by general powers of the guardian to do all things necessary to collect, recover and preserve the estate.

Power of pro-
bate judge
in chambers.
N. S.

SEC. 1818. (§§ 16, 385.) The power conferred upon the probate judge in relation to guardians and wards may be exercised by him at chambers, or as the act of the probate court, when holding such court; and any order appointing a guardian must be entered as and become a decree of the court. The provisions of this title relative to the estates of decedents, so far as they relate to the practice in the probate or the district courts, applies to proceedings under this chapter.

Statutes of 1861, p. 607, § 16.

Provisions of
section 1057
apply to
guardians.
N. S.

SEC. 1819. The provisions of section ten hundred and fifty-seven are hereby declared to apply to guardians appointed by the court, and to the bonds taken or to be taken from such guardians, and to the sureties on such bonds.

NOTE.—These fourteen chapters embody all the laws regulating the practice and proceedings in the probate court. Much care has been taken to simplify the proceedings, as far as consistent with the delicate nature of the subject.

Many causes conspire to render the administration of the estates of decedents, minors, insane and incompetent persons necessarily prolix; this business is often placed in the hands of persons who have no direct personal interest in

bringing the estate to a final settlement speedily and economically. The commission have invited, from all sources likely to render valuable suggestions, with a view to simplify and render economical this practice, and it has been found, after much profound study, research and consultation, that but very few provisions of our statutes, hitherto considered as tending rather to complicate the subject than otherwise, can be dispensed with; as far, however, as this can be, it has been done. We have found more suggestions of real value emanating from the work of our predecessors, in the autography of Judge John Currey, on this subject, than any other they reported. His suggestions have been mainly adopted. To Judges M. C. Blake and S. S. Wright, of San Francisco, and Judge S. M. Bliss, of Marysville, we are indebted for aid and indorsement. The suggestions of the gentleman first named came to us in excellent form, in amendments prepared to about twenty sections, with the indorsement of Judge Wright. They were received after *these sections* had been revised, condensed and fully prepared, but were gratefully received, not only because it evinced an interest in the work, and an earnest desire to contribute to our assistance, but also for the reason that in but two instances did we find that the amendments suggested were not already incorporated. It is needless to say, that where our minds were so remarkably in accord in the main, that these omitted amendments were promptly made as highly proper, and were omitted in our review simply through the want of time the more thoroughly to examine this important work.

We cannot claim perfection for these chapters, for through an earnest desire to do all in our power to meet the expectations of the legislature, giving us but eighteen months in which to labor on the body of our entire statutes, we are compelled to leave this subject in order to turn our attention to other equally important branches, in the hope that we may complete the entire codes during the next session of the legislature, if possible.

We have printed and circulated of these only a few copies of chapter five, containing new provisions on the subject of homesteads, and we are gratified that this chapter is approved by all from whom we have heard verbally, and from the probate judge of Sonoma county we are pleased to acknowledge a written indorsement.

J. C. B.

NOTE.

We have purposely omitted the insolvent laws. Congress having enacted a bankrupt law, our insolvent laws are suspended. Yet we would recommend that our law remain on the statute book, unrepealed by this code, for should the bankrupt law be repealed, our insolvent laws would again be operative. (*Martin vs. Berry*, 37 Cal. 208.)

PART IV.



OF EVIDENCE.

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PART IV.

OF EVIDENCE.

GENERAL DEFINITIONS AND DIVISIONS.

SECTION 1823. Definition of evidence.

1824. Definition of proof.

1825. Definition of law of evidence.

1826. The degree of certainty required to establish facts.

1827. Four kinds of evidence specified.

1828. Several degrees of evidence specified.

1829. Original evidence defined.

1830. Secondary evidence defined.

1831. Direct evidence defined.

1832. Indirect evidence defined.

1833. Primary evidence defined.

1834. Partial evidence defined.

1835. Satisfactory evidence defined.

1836. Indispensable evidence defined.

1837. Conclusive evidence defined.

1838. Cumulative evidence defined.

1839. Corroborative evidence defined.

NOTE.—The New York commissioners say: "It appears to us that the subject of evidence properly belongs to the department of procedure. The great line of division in the law is between the department of rights and the department of remedies. A complete code of procedure must furnish a guide to the suitor for every step he takes, from the beginning to the end of his controversy; in short, he ought to find in it the whole law of remedies. How can he do this, unless he find the rules which inform him what witnesses he may bring, the method of producing them, and of the examination to which they may be subjected? Can it be said with any propriety that the subject of evidence belongs to the code of rights? Then, is not its appropriate place in the code of remedies? It is so classed by philosophical and legal writers. Bentham's *Rationale of Judicial Evidence*, the most profound and original work ever written upon this subject, proceeds upon that classification: 'The

system of procedure,' says he, 'judicial procedure, the system of adjective law, is a means to an end. That end is or ought to be the execution of the commands issued, the fulfilment of the predictions delivered, of the engagements taken, by a system of the substantive law ; the system composed of all the other branches of the body of law put together.

" 'The law respecting evidence is one branch of that system of adjective law ; it therefore ought to be, and everywhere in some degree is, one part of the means directed and applied to the attainment of that end. In proportion to the steadiness and consistency with which it does act in subservience to that end is its congruity, its propriety, its fitness, the claim it has to be approved of and preserved unchanged.' (Vol. 4, p. 477.)

"That the law of evidence is not capable of being reduced into a written code cannot be admitted for a moment. It is too late, after the discussions and achievements of the last half century, now to insist that there is any part of the unwritten law which cannot be reduced to a written code. Though not written in statutes, it is yet written in books, whether books of reports or elementary writers ; it does not depend upon tradition ; it is not handed down from memory through successive generations, as if there were no written language ; but it is preserved in writing. Whatever has been once written can be written again ; wherever scattered it can be found, gathered, digested, reconciled, and arranged in one book, consisting of a series of propositions. Such a book is a code. The codes of other countries have been thus framed. It was not expected, it could not be expected, that they would come forth perfect at first ; but time and experience wrought the necessary amendments, and the results are great national works.

"One of the most distinguished members of the council of state under Napoleon, and one who bore a part in the revision of the French codes, Count Real, wrote a few years since, to the late eminent reformer, William Sampson, of New York, in these terms :

" 'Courage ; persevere in the support of written reason against precedents and vague traditions. If law had no foundation but precedents, all crimes and injuries would have remained unpunished and unredressed from the creation till this day. The first judgment must have been guided by reason. Has reason lost its power ? Precedents have been made by lawyers as articles of faith by divines. But whatever respect I may entertain for religion, I have not the same reverence for the decisions of judges. I do not believe that the march of the human mind is retrograde. * * * Do as we did, but do it better, profiting by our mistakes. Let four or five good heads be united in a commission to frame in silence the project of a code. It is not so difficult a task. It is only to consult together and to select. Do with your best authors as we did with ours, and principally with Pothier's Treatise on Obligations, which we

simply converted into articles of our code. This *project* once formed, submit it *disputationibus eorum* and to come to a result. As long as nothing is written nothing will be done; but you will gain something the moment you have a written text for the ground work of your discussions, how imperfect soever it may be at first. Our code was far from being adopted as it was originally proposed in the entire. I doubt whether one hundred articles were preserved in the form in which they were presented. It will require ardent hearts, and cool heads, and resolved industry, for such a work. With these, I think you will not fail of complete success.'''

In 1851 the legislature of this state adopted the major portion of the provisions of the New York code relating to evidence, and incorporated the provisions so adopted in the practice act. We have taken those provisions and made them the basis of part IV of this code, and have supplied the omitted portion.

SEC. 1823. Judicial evidence is the means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact. Definition of evidence.

N. Y. C. C. P. § 1659.

SEC. 1824. Proof is the effect of evidence, the establishment of a fact by evidence. Definition of proof.

N. Y. C. C. P. § 1660.

SEC. 1825. The law of evidence, which is the subject of this part of the code, is a collection of general rules established by law— Definition of law of evidence.

1. For declaring what is to be taken as true without proof.

2. For declaring the presumptions of law, both those which are disputable and those which are conclusive; and,

3. For the production of legal evidence.

4. For the exclusion of whatever is not legal.

5. For determining, in certain cases, the value and effect of evidence.

N. Y. C. C. P. § 1661.

NOTE.—(N. Y. C. C. P.) We are told occasionally of the law of evidence, as of the other branches of the law, that its rules are well defined, well understood and stable. The entire opposite would be nearer the truth. The books abound with contradictory, fluctuating and inconsistent opinions. The following may be taken as specimens:

Lord Mansfield said, in the case of *Lowe against Joliffe* (1 Bl. 366): "We don't now sit here to take our rules of evidence from *Siderfin* or *Keble*."

Lord Kenyon: "All questions upon the rules of evidence are of vast importance to all orders and degrees of men; our lives, our liberty and our property are all concerned in the support of these rules, which have been *matured by the wisdom of ages*, and are now revered from their *antiquity* and the good *sense* in which they are founded. They are *not rules depending on technical refinements*, but upon *good sense*, and the *preservation of them is the first duty of the judges*." (3 Term Rep. 721, *King vs. Eriswell*.)

The same Lord Kenyon, in *Bent vs. Baker* (3 Term Rep. 32): "I premise, with mentioning what was said by Lord Mansfield on this subject, that the old cases, upon the competency of witnesses, have gone upon *very subtle grounds*. I must acknowledge that there have been various opinions upon this subject, and that it is impossible to reconcile all the cases."

Ashhurst: "There is *so great a contradiction* in decisions respecting the boundaries of evidence that I rather choose to give my opinion on the particular circumstances of the case than to lay down any general rule on the subject." (3 Term Rep. 34.)

Buller, on the same occasion: "This case involves in it the question which has been so repeatedly agitated in courts of law, what objections go to the *credit* and what to the *competency* of the witness; than which, no question is more perplexed."

Grose, on another occasion: "The distinction between *competency* and *credit* is by no means accurately settled. In many of the books, the shade between them is so light that the boundaries of either can hardly be perceived; but in all the books which treat of evidence there are certain *technical* rules laid down which are *highly beneficial* to the public and ought not to be departed from."

The degree of certainty required to establish facts.

§ 1826. The law does not require demonstration; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty; because such proof is rarely possible. Moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind.

N. Y. C. C. P. § 1662.

Four kinds of evidence specified.

§ 1827. There are four kinds of evidence:

1. The knowledge of the court.
2. The testimony of witnesses.
3. Writings.
4. Other material objects presented to the senses.

N. Y. C. C. P. § 1663.

Sec. 1828. There are several degrees of evidence :

1. Original and secondary.
2. Direct and indirect.
3. Primary, partial, satisfactory, indispensable and conclusive.

Several
degrees of
evidence
specified.

N. Y. C. C. P. § 1664.

Sec. 1829. Original evidence is an original writing or material object introduced in evidence.

Original
evidence
defined.

N. Y. C. C. P. § 1665.

Sec. 1830. Secondary evidence is a copy of such original writing or object, or oral evidence thereof.

Secondary
evidence
defined.

N. Y. C. C. P. § 1666.

Sec. 1831. Direct evidence is that which proves the fact in dispute, directly, without an inference or presumption, and which in itself, if true, conclusively establishes that fact. For example: if the fact in dispute be an agreement, the evidence of a witness who was present and witnessed the making of it, is direct.

Direct
evidence
defined.

N. Y. C. C. P. § 1667.

Sec. 1832. Indirect evidence is that which tends to establish the fact in dispute by proving another, and which, though true, does not of itself conclusively establish that fact, but which affords an inference or presumption of its existence. For example: a witness proves an admission of the party to the fact in dispute. This proves a fact, from which the fact in dispute is inferred.

Indirect
evidence
defined.

N. Y. C. C. P. § 1668.

Sec. 1833. Primary evidence is that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence. For example: the certificate of a recording officer is primary evidence of a record, but it may afterwards be rejected upon proof that there is no such record.

Primary
evidence
defined.

N. Y. C. C. P. § 1669.

Sec. 1834. Partial evidence is that which goes to establish a detached fact, in a series tending to the fact in dispute. It may be received, subject to be rejected as incompetent, unless connected with the fact in dispute, by proof of other facts. For example: on an issue of title

Partial
evidence
defined.

to real property, evidence of the continued possession of a remote occupant is partial, for it is of a detached fact, which may or may not be afterwards connected with the fact in dispute.

N. Y. C. C. P. § 1670.

Satisfactory
evidence
defined.

SEC. 1835. That evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind. Such evidence alone will justify a verdict. Evidence less than this is denominated slight evidence.

N. Y. C. C. P. § 1671.

Indispens-
able evidence
defined.

SEC. 1836. Indispensable evidence is that without which a particular fact cannot be proved.

N. Y. C. C. P. § 1672.

Conclusive
evidence
defined.

SEC. 1837. Conclusive or unanswerable evidence is that which the law does not permit to be contradicted. For example: the record of a court of competent jurisdiction cannot be contradicted by the parties to it.

N. Y. C. C. P. § 1673.

Cumulative
evidence
defined.

SEC. 1838. Cumulative evidence is additional evidence of the same character, to the same point.

N. Y. C. C. P. § 1674.

Corrobor-
ative evidence
defined.

SEC. 1839. Corroborative evidence is additional evidence of a different character, to the same point.

N. Y. C. C. P. § 1675.

TITLE I.

OF THE GENERAL PRINCIPLES OF EVIDENCE.

SECTION 1844. One witness sufficient to prove a fact.

1845. Testimony confined to personal knowledge.

1846. Testimony to be in presence of persons affected.

1847. Witness presumed to speak the truth.

1848. One person not affected by acts of another.

1849. Declarations of predecessor in title evidence.

1850. Declarations which are a part of the transaction.

1851. Evidence relating to third person.

1852. Declaration of decedent evidence of pedigree.

1853. Declaration of decedent evidence against his successor in interest.

SECTION 1854. When part of a transaction proved, the whole is admissible.

- 1855. Contents of writing, how proved.
- 1856. An agreement reduced to writing deemed the whole.
- 1857. Construction of language relates to place where used.
- 1858. Construction of statutes and instruments, general rule.
- 1859. The intention of the legislature or parties.
- 1860. The circumstances to be considered.
- 1861. Terms to be construed in their general acceptation.
- 1862. Written words control those printed in a blank form.
- 1863. Persons skilled may testify to decipher characters.
- 1864. Of two constructions, which preferred.
- 1865. A written instrument construed as understood by parties.
- 1866. Construction in favor of natural right preferred.
- 1867. Material allegation only to be proved.
- 1868. Evidence confined to material allegation.
- 1869. Affirmative only to be proved.
- 1870. Facts which may be proved on trial.

SEC. 1844. The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except usage, perjury and treason.

One witness sufficient to prove a fact.

N. Y. C. C. P. § 1677.

SEC. 1845. A witness can testify of those facts only which he knows of his own knowledge; that is, which are derived from his own perceptions, except in those few express cases in which his opinions or inferences, or the declarations of others, are admissible.

Testimony confined to personal knowledge.

N. Y. C. C. P. § 1678.

SEC. 1846. A witness can be heard only upon oath or affirmation, and upon a trial he can be heard only in the presence and subject to the examination of all the parties, if they choose to attend and examine.

Testimony to be in presence of persons affected.

N. Y. C. C. P. § 1679.

SEC. 1847. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility.

Witness presumed to speak the truth.

N. Y. C. C. P. § 1680; Statutes of 1868, p. 193.

SEC. 1848. The rights of the party cannot be prejudiced by the declaration, act or omission of another, except

One person not affected by acts of another.

by virtue of a particular relation between them; therefore, proceedings against one cannot affect another.

N. Y. C. C. P. § 1681.

Declarations
of predeces-
sor in title
evidence.

SEC. 1849. Where, however, one derives title to real property from another, the declaration, act or omission of the latter, while holding the title, in relation to the property, is evidence against the former.

N. Y. C. C. P. § 1682.

Declarations
which are a
part of the
transaction.

SEC. 1850. Where, also, the declaration, act or omission forms part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration, act or omission is evidence, as part of the transaction.

N. Y. C. C. P. § 1683.

Evidence
relating to
third person.

SEC. 1851. And where the question in dispute between the parties is the obligation or duty of a third person, whatever would be evidence for or against such person is primary evidence between the parties.

N. Y. C. C. P. § 1684.

Declaration
of decedent
evidence of
pedigree.

SEC. 1852. The declaration, act or omission of a member of a family, who is a decedent, or out of the jurisdiction, is also admissible as evidence of common reputation, in cases where, on questions of pedigree, such reputation is admissible.

N. Y. C. C. P. § 1685.

Declaration
of decedent
evidence
against his
successor in
interest.

SEC. 1853. The declaration, act or omission of a decedent, having sufficient knowledge of the subject, against his pecuniary interest, is also admissible as evidence to that extent against his successor in interest.

N. Y. C. C. P. § 1686.

When part
of a transac-
tion proved,
the whole is
admissible.

SEC. 1854. When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation or writing is given in evidence, any other act, declaration, conversation or writing, which is necessary to make it understood, may also be given in evidence.

N. Y. C. C. P. § 1687.

Sec. 1855. (§ 447.) There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases :

Contents of writing, how proved.

1. When the original has been lost or destroyed ; in which case proof of the loss or destruction must first be made.

2. When the original is in the possession of the party against whom the evidence is offered, and he fails to produce it after reasonable notice.

3. When the original is a record or other document in the custody of a public officer.

4. When the original has been recorded, and a certified copy of the record is made evidence by this code or by statute.

5. When the original consists of numerous accounts or other documents, which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole.

In the cases mentioned in subdivisions three and four, a copy of the original must be produced ; in those mentioned in subdivisions one and two, either a copy or oral evidence of the contents.

Sec. 1856. When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases :

An agreement reduced to writing deemed the whole.

1. Where a mistake or imperfection of the writing is put in issue by the pleadings.

2. Where the validity of the agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section eighteen hundred and sixty, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties.

N. Y. C. C. P. § 1689.

Sec. 1857. The language of a writing is to be interpreted according to the meaning it bears in the place of

Construction of language relates to place where used.

its execution, unless the parties have reference to a different place.

N. Y. C. C. P. § 1690.

Construction
of statutes
and instru-
ments, gen-
eral rule.

SEC. 1858. In the construction of a statute or instrument the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

N. Y. C. C. P. § 1691.

The inten-
tion of the
legislature
or parties.

SEC. 1859. In the construction of a statute, the intention of the legislature, and in the construction of the instrument, the intention of the parties, is to be pursued if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one, that is inconsistent with it.

N. Y. C. C. P. § 1692.

The circum-
stances to be
considered.

SEC. 1860. For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret.

N. Y. C. C. P. § 1693.

Terms to be
construed in
their general
acceptation.

SEC. 1861. The terms of a writing are presumed to have been used in their primary and general acceptance, but evidence is nevertheless admissible that they have a local, technical or otherwise peculiar signification, and were so used and understood in the particular instance, in which case the agreement must be construed accordingly.

N. Y. C. C. P. § 1694.

Written
words con-
trol those
printed in a
blank form.

SEC. 1862. When an instrument consists partly of written words and partly of a printed form, and the two are inconsistent, the former controls the latter.

N. Y. C. C. P. § 1695.

Persons
skilled may
testify to
decipher
characters.

SEC. 1863. When the characters in which an instrument is written are difficult to be deciphered, or the language of the instrument is not understood by the court,

the evidence of persons skilled in deciphering the characters or who understand the language, is admissible to declare the characters or the meaning of the language.

N. Y. C. C. P. § 1696.

SEC. 1864. When the terms of an agreement have been intended in a different sense by the different parties to it, that sense is to prevail against either party in which he supposed the other understood it, and when different constructions of a provision are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made.

Of two constructions, which preferred.

N. Y. C. C. P. § 1697.

NORR.—Say the New York commissioners: "The first part of this section expresses a rule of ethics which should find a place in these rules of construction. 'When the terms of promise admit of more senses than one, the promise is to be performed in that sense in which the promisor apprehended, at the time that the promisee received it.' It is not the sense in which the promisor actually intended it that always governs the interpretation of an equivocal promise, because at that rate you might excite expectations which you never meant, nor would be obliged to gratify. Much less is it in the sense in which the promisee actually received the promise; for, according to that rule, you might be drawn into engagements which you never designed to make. It must, therefore, be the sense (for there is no other remaining) in which the promisor believed the promisee accepted his promise. This will not differ from the actual intention of the promisor, when the promise is given without collusion or reserve; but we put the rule in the close form, to exclude evasion in cases in which the popular meaning of a phrase and the strict grammatical construction of the words differ; or, in general, wherever the promisor attempts to make his escape through some ambiguity in the expressions which he used.

"Temures promised the garrison of Sebastia that if they would surrender, *no blood should be shed*. The garrison surrendered and Temures buried them all alive. Now, Temures fulfilled the promise in one sense, and in the same, too, in which he intended it at the time, but not in the sense in which the garrison of Sebastia actually received it, nor in the sense in which Temures himself knew that the garrison received it; which last sense, according to our rule, was the sense in which he was in conscience bound to have performed it. * * * From the principle established in the last chapter, 'that the obligation of a promisor is to be measured by the expectation which the promisor anyhow voluntarily and knowingly excites, results a rule which gov-

erns the construction of all contracts, and is capable, from its simplicity, of being applied with great care and certainty, viz: *that whatever is expected by one side and known to be so expected by the other, is to be deemed a part or condition of the contract.*'' (Paley's Moral Philosophy, pp. 85, 97.)

A written instrument construed as understood by parties.

SEC. 1865. A written notice, as well as every other writing, is to be construed according to the ordinary acceptance of its terms. Thus a notice to the drawers or indorsers of a bill of exchange or promissory note, that it has been protested for want of acceptance or payment, must be held to import that the same has been duly presented for acceptance or payment and the same refused, and that the holder looks for payment to the person to whom the notice is given.

N. Y. C. C. P. § 1698.

Construction in favor of natural right preferred

SEC. 1866. When a statute or instrument is equally susceptible of two interpretations, one in favor of natural right and the other against it, the former is to be adopted.

N. Y. C. C. P. § 1699.

Material allegation only to be proved.

SEC. 1867. None but a material allegation need be proved.

N. Y. C. C. P. § 1701.

Evidence confined to material allegation.

SEC. 1868. Evidence must correspond with the substance of the material allegations and be relevant to the question in dispute. Collateral questions must therefore be avoided. It is, however, within the discretion of the court to permit inquiry into a collateral fact, when such fact is directly connected with the question in dispute, and is essential to its proper determination, or when it affects the credibility of a witness.

N. Y. C. C. P. § 1702.

Affirmative only to be proved.

SEC. 1869. Each party must prove his own affirmative allegations. Evidence need not be given in support of a negative allegation, except when such negative allegation is an essential part of the statement of the right or title on which the cause of action or defence is founded, nor even in such case when the allegation is a denial of the existence of a document, the custody of which belongs to the opposite party.

N. Y. C. C. P. § 1703.

SEC. 1870. In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:

Facts which
may be
proved on
trial.

1. The precise fact in dispute.
2. The act, declaration or omission of a party, as evidence against such party.
3. An act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto.
4. The act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage or death of any person related by blood or marriage to such deceased person; the act or declaration of a deceased person done or made against his interest in respect to his real property; and also in criminal actions, the act or declaration of a dying person, made under a sense of impending death, respecting the cause of his death.
5. After proof of a partnership or agency, the act or declaration of a partner or agent of the party, within the scope of the partnership or agency, and during its existence. The same rule applies to the act or declaration of a joint owner, joint debtor, or other person jointly interested with the party.
6. After proof of a conspiracy, the act or declaration of a conspirator against his co-conspirator, and relating to the conspiracy.
7. The act, declaration or omission forming part of a transaction, as explained in section eighteen hundred and fifty.
8. The testimony of a witness deceased, or out of the jurisdiction, or unable to testify, given in a former action between the same parties, relating to the same matter.
9. The opinion of a witness respecting the identity or handwriting of a person, when he has knowledge of the person or handwriting; his opinion on a question of science, art or trade, when he is skilled therein.
10. The opinion of a subscribing witness to a writing, the validity of which is in dispute, respecting the mental sanity of the signer; and the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for the opinion being given.
11. Common reputation existing previous to the con-

Facts which
may be
proved on
trial.

troverſy, reſpecting facts of a public or general intereſt more than thirty years old, and in caſes of pedigree and boundary.

12. Uſage, to explain the true character of an act, contract or inſtrument, where ſuch true character is not otherwiſe plain; but uſage is never admiſſible, except as an inſtrument of interpretation.

13. Monuments and inſcriptions in public places, as evidence of common reputation; and entries in family bibles, or other family books or charts; engravings on rings, family portraits and the like, as evidence of pedigree.

14. The contents of a writing, when oral evidence thereof is admiſſible.

15. Any other facts from which the facts in iſſue are preſumed or are logically inferrible.

16. Such facts as ſerve to ſhow the credibility of a witneſs, as explained in ſection eighteen hundred and forty-seven.

N. Y. C. C. P. § 1704.

TITLE II.

OF THE KINDS AND DEGREES OF EVIDENCE.

CHAPTER I. *Knowledge of the court.*

II. *Witnesses.*

III. *Writings.*

IV. *Material objects preſented to the ſenſes, other than writings.*

V. *Indirect evidence.*

VI. *Indiſpensable evidence.*

VII. *Concluſive and unanſwerable evidence.*

CHAPTER I.

KNOWLEDGE OF THE COURT.

SECTION 1875. Certain facts of general notoriety aſſumed to be true. Specification of ſuch facts.

Certain facts
of general
notoriety
aſſumed to
be true.

SEC. 1875. Courts take judicial notice of the following facts:

1. The true signification of all English words and phrases, and of all legal expressions. Specification of such facts.

2. Whatever is established by law.

3. Public and private official acts of the legislative, executive and judicial departments of this state and of the United States.

4. The seals of all the courts of this state and of the United States.

5. The accession to office and the official signatures and seals of office of the principal officers of government in the legislative, executive and judicial departments of this state and of the United States.

6. The existence, title, national flag and seal of every state or sovereign recognized by the executive power of the United States.

7. The seals of courts of admiralty and maritime jurisdiction, and of notaries public.

8. The laws of nature, the measure of time, and the geographical divisions and political history of the world.

In all these cases the court may resort for its aid to appropriate books or documents of reference.

N. Y. C. C. P. § 1706.

CHAPTER II.

WITNESSES.

SECTION 1878. Witnesses defined.

1879. All persons capable of perception and communication may be witnesses.

1880. Persons who cannot testify.

1881. Persons in certain relations to parties prohibited.

1882. When privileged persons must testify.

1883. Judge or a juror may be witness.

1884. When an interpreter to be sworn.

Sec. 1878. A witness is a person whose declaration under oath is received as evidence for any purpose, whether such declaration be made on oral examination or by deposition or affidavit. Witnesses defined.

N. Y. C. C. P. § 1707.

Sec. 1879. (§ 391.) All persons, without exception, otherwise than is specified in the next two sections, who, All persons capable of perception and communication may be witnesses.

having organs of sense, can perceive, and, perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although, in every case, the credibility of the witness may be drawn in question, as provided in section eighteen hundred and forty-seven.

N. Y. C. C. P. § 1708.

Persons
who cannot
testify.

Sec. 1880. (§ 394.) The following persons cannot be witnesses:

1. Those who are of unsound mind at the time of their production for examination.
2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly.
3. Mongolians, Chinese, Indians or persons having one-half or more of Indian blood, in an action or proceeding wherein a white person is a party.

Persons
in certain
relations
to parties
prohibited.

Sec. 1881. (§§ 395, 396, 397, 398, 399.) There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases:

1. A husband cannot be examined for or against his wife, without her consent; nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other.
2. An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him or his advice given thereon in the course of professional employment.
3. A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in

the course of discipline enjoined by the church to which he belongs.

4. A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient.

5. A public officer cannot be examined as to communications made to him in official confidence, when the public interests would suffer by the disclosure.

N. Y. C. C. P. § 1710 ; Statutes of 1865-6, p. 46, § 1.

Sec. 1882. If a person offer himself as a witness, that is to be deemed a consent to the examination, also, of a wife, husband, attorney, clergyman, physician or surgeon on the same subject, within the meaning of the first four subdivisions of the last section.

When privileged persons must testify.

N. Y. C. C. P. § 1711.

Sec. 1883. (§ 400.) The judge himself or any juror may be called as a witness by either party; but in such case it is in the discretion of the court or judge to order the trial to be postponed or suspended, and to take place before another judge or jury.

Judge or a juror may be witness.

Sec. 1884. (§ 401.) When a witness does not understand and speak the English language, an interpreter must be sworn to interpret for him. Any person, a resident of the proper county, may be summoned by any court or judge to appear before such court or judge to act as interpreter in any action or proceeding. The summons must be served and returned in like manner as a subpoena. Any person so summoned, who fails to attend at the time and place named in the summons, is guilty of a contempt.

When an interpreter to be sworn.

CHAPTER III.

WRITINGS.

ARTICLE I. WRITINGS IN GENERAL.

II. PUBLIC WRITINGS.

III. PRIVATE WRITINGS.

ARTICLE I.

WRITINGS IN GENERAL.

SECTION 1887. Writings, public and private.

1888. Public writings defined.

1889. All others private.

Writings,
public and
private.

SEC. 1887. Writings are of two kinds :

1. Public ; and,
2. Private.

N. Y. C. C. P. § 1712.

Public writ-
ings defined.

SEC. 1888. Public writings are :

1. The written acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial and executive, whether of this state, of the United States, of a sister state or of a foreign country.

2. Public records, kept in this state, of private writings.

N. Y. C. C. P. § 1713.

All others
private.

SEC. 1889. All other writings are private.

N. Y. C. C. P. § 1714.

ARTICLE II.

PUBLIC WRITINGS.

SECTION 1892. Every citizen entitled to inspect and copy public writings.

1893. Public officers bound to give copies.

1894. Four kinds of public writings.

1895. Laws, written or unwritten.

1896. Written laws defined.

1897. Constitution and statutes.

1898. Public and private statutes defined.

1899. Unwritten law defined.

1900. Books containing laws presumed to be correct.

1901. Public seal authenticates a law or document.

1902. Other evidence of laws of other states.

1903. Recitals in statutes, how far evidence.

1904. Judicial record defined.

1905. Record, how authenticated as evidence.

1906. Record of a foreign country, how authenticated.

1907. Oral evidence of a foreign record.

1908. Effect of a judgment upon rights in various cases.

1909. Effect of other judicial orders, when conclusive.

1910. Where parties are to be deemed the same.

1911. What deemed adjudged in a judgment.

SECTION 1912. Where sureties bound, principal is also.

1913. Record of another state, its effect.

1914. Record of a court of admiralty.

1915. Effect of a foreign judgment.

1916. Manner of impeaching a record.

1917. The jurisdiction necessary in a judgment.

1918. Manner of proving other official documents.

1919. Public record of private writing evidence.

1920. Entries in official books primary evidence.

1921. Justice's judgment in other states, how proved.

1922. Same.

1923. Contents of other official certificates.

1924. Provisions in relation to states apply to territories.

Sec. 1892. Every citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute.

Every citizen entitled to inspect and copy public writings.

N. Y. C. C. P. § 1715.

Sec. 1893. Every public officer having the custody of a public writing, which a citizen has a right to inspect, is bound to give him, on demand, a certified copy of it, on payment of the legal fees therefor, and such copy is primary as evidence of the original writing.

Public officers bound to give copies

N. Y. C. C. P. § 1716.

Sec. 1894. Public writings are divided into four classes :

1. Laws.

2. Judicial records.

3. Other official documents.

4. Public records, kept in this state, of private writings.

Four kinds of public writings.

N. Y. C. C. P. § 1717.

Sec 1895. Laws, whether organic or ordinary, are either written or unwritten.

Laws, written or unwritten.

N. Y. C. C. P. § 1718.

Sec. 1896. A written law is that which is promulgated in writing, and of which a record is in existence.

Written law defined.

N. Y. C. C. P. § 1719.

Sec. 1897. The organic law is the constitution of government, and is altogether written. Other written laws are denominated statutes. The written law of this state is therefore contained in its constitution and statutes, and in the constitution and statutes of the United States.

Constitution and statutes.

N. Y. C. C. P. § 1720.

Public and
private stat-
utes defined.

SEC. 1898. Statutes are public or private. A private statute is one which concerns only certain designated individuals, and affects only their private rights. All other statutes are public, in which are included statutes creating or affecting corporations.

N. Y. C. C. P. § 1721.

Unwritten
law defined.

SEC. 1899. Unwritten law is the law not promulgated and recorded, as mentioned in section eighteen hundred and ninety-six, but which is, nevertheless, observed and administered in the courts of the country. It has no certain repository, but is collected from the reports of the decisions of the courts and the treatises of learned men.

N. Y. C. C. P. § 1722.

Books con-
taining laws
presumed to
be correct

SEC. 1900. (§ 453.) Books printed or published under the authority of a sister state or foreign country, and purporting to contain the statutes, code or other written law of such state or country, or proved to be commonly admitted in the tribunals of such state or country, as evidence of the written law thereof, are admissible in this state as evidence of such law.

Public seal
authentici-
cates a law
or document.

SEC. 1901. The public seal of the state or country, affixed to a copy of the written law or other public writing, is also admissible as evidence of such law or writing.

N. Y. C. C. P. § 1724.

Other evi-
dence of laws
of other
states.

SEC. 1902. The oral testimony of witnesses, skilled therein, is admissible as evidence of the unwritten law of a sister state or foreign country, as are also printed and published books of reports of decisions of the courts of such state or country, or proved to be commonly admitted in such courts.

N. Y. C. C. P. § 1725.

Recitals in
statutes, how
far evidence.

SEC. 1903. The recitals in a public statute are conclusive evidence of the facts recited, for the purpose of carrying it into effect, but no further. The recitals in a private statute are conclusive evidence between parties who claim under its provisions. but no further.

N. Y. C. C. P. § 1726.

SEC. 1904. A judicial record is the record or official entry of the proceedings in a court of justice, or of the official act of a judicial officer, in an action or special proceeding.

Judicial
record
defined.

N. Y. C. C. P. § 172A

SEC. 1905. (§§ 449, 450.) A judicial record of this state, or of the United States, may be proved by the production of the original, or by a copy thereof certified by the clerk or other person having the legal custody thereof. That of a sister state may be proved by the attestation of the clerk and the seal of the court annexed, if there be a clerk and seal, together with a certificate of the chief judge or presiding magistrate, that the attestation is in due form.

Record, how
authentica-
ted as evi-
dence.

SEC. 1906. (§ 451.) A judicial record of a foreign country may be proved by the attestation of the clerk, with the seal of the court annexed, if there be a clerk and seal, or of the legal keeper of the record, with the seal of his office annexed, if there be a seal, together with a certificate of the chief judge or presiding magistrate that the person making the attestation is the clerk of the court or the legal keeper of the record, and in either case, that the signature of such person is genuine; and, also, together with the certificate of the secretary of state, or other officer of the government under whose authority the record is kept, having the custody of the great or principal seal of such government, to the effect that the court or officer whose judicial act is certified had jurisdiction to perform such act, specifying, generally, the nature of the jurisdiction, and verifying the signature of the clerk or other legal keeper of the record, and also verifying the signature of the chief judge or presiding magistrate.

Record of
a foreign
country,
how authen-
ticated

SEC. 1907. (§ 452.) A copy of the judicial record of a foreign country is also admissible in evidence, upon proof—

Oral evi-
dence of a
foreign
record.

1. That the copy offered has been compared by the witness with the original, and is an exact transcript of the whole of it.

2. That such original was in the custody of the clerk of the court or other legal keeper of the same; and,

3. That the copy is duly attested by a seal which is proved to be the seal of the court where the record remains, if it be the record of a court; or if there be no

such seal, or if it be not a record of a court, by the signature of the legal keeper of the original.

Effect of a judgment upon rights in various cases.

SEC. 1908. The effect of a judgment or final order in an action or special proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows :

1. In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will or administration, or the condition or relation of the person.

2. In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity.

N. Y. C. C. P. § 1731.

NOTE.—See sections 1913, 1914 and 1915.

Effect of other judicial orders, when conclusive.

SEC. 1909. Other judicial orders of a court or judge of this state, or of the United States, create a disputable presumption, according to the matter directly determined, between the same parties and their representatives and successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity.

N. Y. C. C. P. § 1732.

Where parties are to be deemed the same.

SEC. 1910. The parties are deemed to be the same when those between whom the evidence is offered were on opposite sides in the former case, and a judgment or other determination could in that case have been made between them alone, though other parties were joined with both or either.

N. Y. C. C. P. § 1733.

What deemed adjudged in a judgment.

SEC. 1911. That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto.

N. Y. C. C. P. § 1734.

Sec. 1912. Whenever, pursuant to the last four sections, a party is bound by a record, and such party stands in the relation of a surety for another, the latter is also bound from the time that he has notice of the action or proceeding, and an opportunity at the surety's request to join in the defence.

Where sureties bound, principal is also.

N. Y. C. C. P. § 1735.

Sec. 1913. The effect of a judicial record of a sister state is the same in this state as in the state where it was made, except that it can only be enforced here by an action or special proceeding, and except, also, that the authority of a guardian or committee, or of an executor or administrator, does not extend beyond the jurisdiction of the government under which he was invested with his authority.

Record of another state, its effect.

N. Y. C. C. P. § 1736.

Sec. 1914. The effect of the judicial record of a court of admiralty of a foreign country is the same as if it were the record of a court of admiralty of the United States.

Record of a court of admiralty.

N. Y. C. C. P. § 1737.

Sec. 1915. The effect of the judgment of any other tribunal of a foreign country having jurisdiction to pronounce the judgment, is as follows:

Effect of a foreign judgment.

1. In case of a judgment against a specific thing, the judgment is conclusive upon the title to the thing.

2. In case of a judgment against a person, the judgment is presumptive evidence of a right as between the parties and their successors in interest by a subsequent title, and can only be repelled by evidence of a want of jurisdiction, want of notice to the party, collusion, fraud or clear mistake of law or fact.

N. Y. C. C. P. § 1738.

Sec. 1916. Any judicial record may be impeached by evidence of a want of jurisdiction in the court or judicial officer, of collusion between the parties, or of fraud in the party offering the record, in respect to the proceedings.

Manner of impeaching a record.

N. Y. C. C. P. § 1739.

Sec. 1917. The jurisdiction sufficient to sustain a record is jurisdiction over the cause, over the parties and over

The jurisdiction necessary in a judgment.

the thing, when a specific thing is the subject of the judgment.

N. Y. C. C. P. § 1740.

Manner of
proving
other official
documents.

SEC. 1918. Other official documents may be proved, as follows:

1. Acts of the executive of this state, by the records of the state department of the state, and of the United States, by the records of the state department of the United States, certified by the heads of those departments respectively. They may also be proved by public documents printed by order of the legislature or congress, or either house thereof.

2. The proceedings of the legislature of this state or of congress, by the journals of those bodies respectively, or either house thereof, or by published statutes or resolutions, or by copies certified by the clerk or printed by their order.

3. The acts of the executive or the proceedings of the legislature of a sister state, in the same manner.

4. The acts of the executive or the proceedings of the legislature of a foreign country, by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some public act of the executive of the United States.

5. Acts of a municipal corporation of this state, or of a board or department thereof, by a copy, certified by the legal keeper thereof, or by a printed book published by the authority of such corporation.

6. Documents of any other class in this state, by the original or by a copy certified by the legal keeper thereof.

7. Documents of any other class in a sister state, by the original or by a copy certified by the legal keeper thereof, together with the certificate of the secretary of state, judge of the supreme, superior or county court, or mayor of a city of such state, that the copy is duly certified by the officer having the legal custody of the original.

8. Documents of any other class in a foreign country, by the original or by a copy certified by the legal keeper thereof, with a certificate, under seal, of the country or sovereign, that the document is a valid and subsisting document of such country, and that the copy is duly certified, by the officer having the legal custody of the original.

N. Y. C. C. P. § 1741.

SEC. 1919. A public record of a private writing may be proved by the original record, or by a copy thereof certified by the legal keeper of the record.

Public record of private writing evidence.

N. Y. C. C. P. § 1742; Statutes of 1857, p. 317.

SEC. 1920. Entries in public or other official books or records, made in the performance of his duty by a public officer of this state, or by another person in the performance of a duty specially enjoined by law, are primary evidence of the facts stated therein.

Entries in official books primary evidence.

N. Y. C. C. P. § 1743.

SEC. 1921. A transcript from the record or docket of a justice of the peace of a sister state, of a judgment rendered by him, of the proceedings in the action before the judgment, of the execution and return, if any, subscribed by the justice and verified in the manner prescribed in the next section, is admissible evidence of the facts stated therein.

Justice's judgment in other states, how proved.

N. Y. C. C. P. § 1744.

SEC. 1922. (§ 450.) There must be attached to the transcript a certificate of the justice that the transcript is in all respects correct, and that he had jurisdiction of the action, and also a further certificate of the clerk or prothonotary of the county in which the justice resided at the time of rendering the judgment, under the seal of the county, or the seal of the court of common pleas or county court thereof, certifying that the person subscribing the transcript was, at the date of the judgment, a justice of the peace in the county, and that the signature is genuine. Such judgment, proceedings and jurisdiction may also be proved by the justice himself, on the production of his docket or by a copy of the judgment, and his oral examination as a witness.

Same.

N. Y. C. C. P. § 1745.

SEC. 1923. Whenever a copy of a writing is certified for the purpose of evidence, the certificate must state that the copy has been compared by the certifying officer with the original, and is a correct transcript therefrom and of the whole of such original or of a specified part thereof. The official seal, if there be any, of the certifying officer, must also be affixed to the certificate, except

Contents of other official certificates.

when the certificate of a clerk of a court is used in the same court or before an officer thereof.

N. Y. C. C. P. § 1746.

Provisions in
relation to
states apply
to territories

Sec. 1924. The provisions of the preceding sections of this article applicable to the public writings of a sister state are equally applicable to the public writings of a territory of the United States.

N. Y. C. C. P. § 1747.

ARTICLE III.

PRIVATE WRITINGS.

Section 1929. Private writings classified.

- 1930. Seal defined.
- 1931. Manner of making it.
- 1932. Effect of a seal.
- 1933. Execution of an instrument defined.
- 1934. Compromise of a debt without seal good.
- 1935. Subscribing witness defined.
- 1936. Books, maps, etc., how far evidence.
- 1937. Original writing to be produced or accounted for.
- 1938. When in possession of adverse party, notice to be given.
- 1939. Writings called for and inspected may be withheld.
- 1940. Where there is a subscribing witness, the proof.
- 1941. Other witnesses may also testify.
- 1942. When evidence of execution not necessary.
- 1943. Evidence of handwriting.
- 1944. Allowed by comparison.
- 1945. Same.
- 1946. Entries of decedents evidence in specified cases.
- 1947. Copies of entries also allowed.
- 1948. Private writings acknowledged and certified.
- 1949. County clerks to keep private papers deposited.
- 1950. Public records not to be carried about.

Private
writings
classified.

Sec. 1929. Private writings are either—

1. Sealed ; or,
2. Unsealed.

N. Y. C. C. P. § 1748.

Seal defined

Sec. 1930. A seal is a particular sign, made to attest, in the most formal manner, the execution of an instrument.

N. Y. C. C. P. § 1749.

Manner of
making it.

Sec. 1931. A public seal in this state is a stamp or impression made upon wax, wafer, paper, or any other sub-

stance upon which a visible and permanent impression can be made. A private seal may be in the same manner, or it may be made without an impression, by a wafer or wax attached to the instrument, or by a paper attached to it by an adhesive substance. A scroll or other sign made in a sister state or foreign country, and there recognized as a seal, must be so regarded in this state, except for a transfer of real property in this state.

N. Y. C. C. P. § 1750.

SEC. 1932. The seal affixed to a writing is presumptive evidence of a consideration. In other respects there is no difference between sealed and unsealed writings. A writing under seal may therefore be changed or altogether discharged by a writing not under seal, or by an oral agreement otherwise valid.

Effect of a seal.

N. Y. C. C. P. § 1751.

SEC. 1933. The execution of an instrument is the subscribing and delivering it, with or without affixing a seal.

Execution of an instrument defined

N. Y. C. C. P. § 1752.

SEC. 1934. An agreement in writing without a seal, for the compromise or settlement of a debt, is as obligatory as if a seal were affixed.

Compromise of a debt without seal good.

N. Y. C. C. P. § 1753.

SEC. 1935. A subscribing witness is one who sees a writing executed or hears it acknowledged, and at the request of the party thereupon signs his name as a witness.

Subscribing witness defined.

N. Y. C. C. P. § 1755.

SEC. 1936. Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are primary evidence of facts of general notoriety and interest.

Books, maps, etc., how far evidence.

N. Y. C. C. P. § 1756.

SEC. 1937. The original writing must be produced and proved, except as provided in sections eighteen hundred and fifty-five and nineteen hundred and nineteen. If it has been lost, proof of the loss must first be made before evidence can be given of its contents. Upon such proof

Original writing to be produced or accounted for.

being made, together with proof of the due execution of the writing, its contents may be proved by a copy, or by a recital of its contents in some authentic document, or by the recollection of a witness, as provided in section eighteen hundred and fifty-five.

N. Y. C. C. P. § 1757.

When in possession of adverse party notice to be given.

SEC. 1938. If the writing be in the custody of the adverse party, he must first have reasonable notice to produce it. If he then fail to do so, the contents of the writing may be proved as in case of its loss. But the notice to produce it is not necessary where the writing is itself a notice, or where it has been wrongfully obtained or withheld by the adverse party.

N. Y. C. C. P. § 1758.

Writings called for and inspected may be withheld.

SEC. 1939. Though a writing called for by one party is produced by the other, and is thereupon inspected by the party calling for it, he is not obliged to produce it as evidence in the case.

N. Y. C. C. P. § 1759.

When there is a subscribing witness, the proof.

SEC. 1940. If there be a subscribing witness to a writing produced in evidence, its execution must be proved by him, if he can be produced and can testify. If there be more than one subscribing witness, the evidence of one is sufficient. If all the subscribing witnesses be dead or out of the jurisdiction, or incapable of attending or testifying, or cannot be found, the handwriting of one of them and that of the party must be proved.

N. Y. C. C. P. § 1760.

Other witnesses may also testify.

SEC. 1941. If the subscribing witness denies or does not recollect the execution of the writing, its execution may still be proved by other evidence.

N. Y. C. C. P. § 1761.

When evidence of execution not necessary.

SEC. 1942. Where, however, evidence is given that the party against whom the writing is offered has at any time admitted its execution, no other evidence of the execution need be given, when the instrument is one mentioned in section nineteen hundred and forty-five, or one produced from the custody of the adverse party, and has been acted upon by him as genuine.

N. Y. C. C. P. § 1762.

Sec. 1943. The handwriting of a person may be shown by any one who believes it to be his, and who has seen him write, or has seen writings purporting to be his, upon which he has acted or been charged, and who has thus acquired a knowledge of his handwriting.

Evidence of handwriting.

N. Y. C. O. P. § 1763.

Sec. 1944. Evidence respecting the handwriting may also be given by a comparison, made by the witness or the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered.

Allowed by comparison.

N. Y. C. C. P. § 1764.

Sec. 1945. Where a writing is more than thirty years old, the comparisons may be made with writings purporting to be genuine, and generally respected and acted upon as such, by persons having an interest in knowing the fact.

Same.

N. Y. C. C. P. § 1765.

Sec. 1946. The entries and other writings of a decedent, made at or near the time of the transaction, and in a position to know the facts stated therein, may be read as primary evidence of the facts stated therein, in the following cases:

Entries of decedents evidence in specified cases.

1. When the entry was made against the interest of the person making it.

2. When it was made in a professional capacity and in the ordinary course of professional conduct.

3. When it was made in the performance of a duty specially enjoined by law.

N. Y. C. C. P. § 1766.

Sec. 1947. When an entry is repeated in the regular course of business, one being copied from another at or near the time of the transaction, all the entries are equally regarded as originals.

Copies of entries also allowed.

N. Y. C. C. P. § 1767.

Sec. 1948. Every private writing, except last wills and testaments, may be acknowledged or proved and certified in the manner provided for the acknowledgment or proof of conveyances of real property, and the certificate of such acknowledgment or proof is primary evidence of

Private writings acknowledged and certified.

the execution of the writing, in the same manner as if it were a conveyance of real property.

N. Y. C. C. P. § 1768.

County
clerks to
keep private
papers
deposited.

SEC. 1949. Every county recorder must receive and file in his office any private writing delivered to him for that purpose, and give a written receipt therefor. Such writing must be properly indorsed so as to indicate its general nature, the names of the parties thereto, and the time of filing, and must be deposited and kept in such office separate from other papers. It is then subject to the examination of any person, but cannot be withdrawn, except temporarily, upon the written order of the depositor or his legal representatives, or on the order of a court of record, for the purpose of being read in evidence therein.

N. Y. C. C. P. § 1769.

Public
records not
to be carried
about. ¶

SEC. 1950. The record of a conveyance of real property, or other record, a transcript of which is admissible in evidence, must not be removed from the office where it is kept, except upon the order of a court, or when temporarily removed by the clerk having it in custody to the court of which he is clerk, or to courts held in the city or village where his office is situated.

N. Y. C. C. P. § 1772.

CHAPTER IV.

MATERIAL OBJECTS PRESENTED TO THE SENSES, OTHER THAN WRITINGS.

SECTION 1954. Material objects.

Material
objects.

SEC. 1954. Whenever an object, cognizable by the senses, has such a relation to the fact in dispute as to afford reasonable grounds of belief respecting it, or to make an item in the sum of the evidence, such object may be exhibited to the jury, or its existence, situation and character may be proved by witnesses. The admission of such evidence must be regulated by the sound discretion of the court.

N. Y. C. C. P. § 1773.

CHAPTER V.

INDIRECT EVIDENCE; INFERENCES AND PRESUMPTIONS.

SECTION 1957. Indirect evidence classified.

1958. Inference defined.

1959. Presumption defined.

1960. When an inference arises.

1961. Presumptions may be controverted, when.

1962. Specification of conclusive presumptions.

1963. All other presumptions may be controverted.

SEC. 1957. Indirect evidence is of two kinds :

1. Inferences; and,
2. Presumptions.

Indirect
evidence
classified.

N. Y. C. C. P. § 1774.

SEC. 1958. An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect.

Inference
defined.

N. Y. C. C. P. § 1775.

SEC. 1959. A presumption is a deduction which the law expressly directs to be made from particular facts.

Presumption
defined.

N. Y. C. C. P. § 1776.

SEC. 1960. An inference must be founded—

1. On a fact legally proved ; and,
2. On such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business or the course of nature.

When an
inference
arises.

N. Y. C. C. P. § 1777.

SEC. 1961. A presumption (unless declared by law to be conclusive) may be controverted by other evidence, direct or indirect; but unless so controverted the jury are bound to find according to the presumption.

Presump-
tions may be
controvert-
ed, when.

N. Y. C. C. P. § 1778.

SEC. 1962. The following presumptions, and no others, are deemed conclusive :

Specifi-
cation
of conclusive
presump-
tions.

1. A malicious and guilty intent, from the deliberate commission of an unlawful act, for the purpose of injuring another.

2. The truth of the facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title; but this rule does not apply to the recital of a consideration.

3. Whenever a party has, by his own declaration, act or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act or omission, be permitted to falsify it.

4. A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation.

5. The issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate.

6. The judgment or order of a court, when declared by this code to be conclusive; but such judgment or order must be alleged in the pleadings if there be an opportunity to do so; if there be no such opportunity, the judgment or order may be used as evidence.

7. Any other presumption which, by statute, is expressly made conclusive.

N. Y. C. C. P. § 1779.

All other
presump-
tions may be
controverted

SEC. 1963. All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind:

1. That a person is innocent of crime or wrong.

2. That an unlawful act was done with an unlawful intent.

3. That a person intends the ordinary consequence of his voluntary act.

4. That a person takes ordinary care of his own concerns.

5. That evidence wilfully suppressed would be adverse if produced.

6. That higher evidence would be adverse from inferior being produced.

7. That money paid by one to another was due to the latter.

8. That a thing delivered by one to another belonged to the latter.

9. That an obligation delivered up to the debtor has been paid.

All other
presump-
tions may be
controverted

10. That former rent or instalments have been paid when a receipt for later is produced.

11. That things which a person possesses are owned by him.

12. That a person is the owner of property from exercising acts of ownership over it, or from common reputation of his ownership.

13. That a person in possession of an order on himself for the payment of money, or the delivery of a thing, has paid the money or delivered the thing accordingly.

14. That a person acting in a public office was regularly appointed to it.

15. That official duty has been regularly performed.

16. That a court or judge, acting as such, whether in this state or any other state or country, was acting in the lawful exercise of his jurisdiction.

17. That a judicial record, when not conclusive, does still correctly determine or set forth the rights of the parties.

18. That all matters within an issue were laid before the jury and passed upon by them; and in like manner, that all matters within a submission to arbitration were laid before the arbitrators and passed upon by them.

19. That private transactions have been fair and regular.

20. That the ordinary course of business has been followed.

21. That a promissory note or bill of exchange was given or indorsed for a sufficient consideration.

22. That an indorsement of a negotiable promissory note or bill of exchange was made at the time and place of making the note or bill.

23. That a writing is truly dated.

24. That a letter duly directed and mailed was received in the regular course of the mail.

25. Identity of person from identity of name.

26. That a person not heard from in seven years is dead.

27. That acquiescence followed from a belief that the thing acquiesced in was conformable to the right or fact.

28. That things have happened according to the ordinary course of nature and the ordinary habits of life.

All other
presump-
tions may be
controverted

29. That persons acting as copartners have entered into a contract of copartnership. ●

30. That a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage.

31. That a child born in lawful wedlock, there being no divorce from bed and board, is legitimate.

32. That a thing once proved to exist continues as long as is usual with things of that nature.

33. That the law has been obeyed.

34. That a document or writing more than thirty years old, is genuine, when the same has been since generally acted upon as genuine, by persons having an interest in the question, and its custody has been satisfactorily explained.

35. That a printed and published book, purporting to be printed or published by public authority, was so printed or published.

36. That a printed and published book, purporting to contain reports of cases adjudged in the tribunals of the state or country where the book is published, contains correct reports of such cases.

37. That a trustee or other person, whose duty it was to convey real property to a particular person, has actually conveyed to him, when such presumption is necessary to perfect the title of such person or his successor in interest.

38. The uninterrupted use by the public of land for a burial ground, for five years, with the consent of the owner and without a reservation of his rights, is presumptive evidence of his intention to dedicate it to the public for that purpose.

39. When two persons perish in the same calamity, such as a wreck, a battle or a conflagration, and it is not shown who died first, and there are no particular circumstances from which it can be inferred, survivorship is presumed from the probabilities resulting from the strength, age and sex, according to the following rules:

First—If both of those who have perished were under the age of fifteen years, the older is presumed to have survived.

Second—If both were above the age of sixty, the younger is presumed to have survived.

Third—If one be under fifteen and the other above sixty, the former is presumed to have survived.

Fourth—If both be over fifteen and under sixty, and the sexes be different, the male is presumed to have survived. If the sexes be the same, then the older.

Fifth—If one be under fifteen or over sixty and the other between those ages, the latter is presumed to have survived.

N. Y. C. C. P. § 1780.

CHAPTER VI.

INDISPENSABLE EVIDENCE.

SECTION 1967. Indispensable evidence, what.

1968. To prove usage, perjury and treason, more than one witness required.

1969. Will to be in writing.

1970. How revoked.

1971. Transfer of real property to be in writing.

1972. Last section not to extend to certain cases.

1973. Agreement not in writing, when invalid.

1974. Representation of credit by writing.

SEC. 1967. The law makes certain evidence necessary to the validity of particular acts, or the proof of particular facts.

Indispensable evidence, what.

N. Y. C. C. P. § 1781.

SEC. 1968. Usage, perjury and treason must be proved by testimony of more than one witness. Usage by the testimony of at least two witnesses; treason by the testimony of two witnesses to the same overt act; and perjury by the testimony of two witnesses, or one witness and corroborating circumstances.

To prove usage, perjury and treason, more than one witness required.

N. Y. C. C. P. § 1782.

SEC. 1969. A last will and testament, except when made by a soldier in actual military service, or by a mariner at sea, is invalid, unless it be in writing and executed with such formalities as are required by law. Evidence, therefore, of such will cannot be received without

Will to be in writing.

the written instrument itself, or secondary evidence of its contents in the cases prescribed by law.

N. Y. C. C. P. § 1783.

How revoked

SEC. 1970. A written will cannot be revoked or altered otherwise than by another written will or another writing of the testator, declaring such revocation or alteration, and executed with the same formalities required by law for the will itself; or unless the will be burned, torn, cancelled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person in his presence, by his direction and consent; and when so done by another person, the direction and consent of the testator and the fact of such injury or destruction must be proved by at least two witnesses.

N. Y. C. C. P. § 1784.

Transfer of
real property
to be in
writing.

SEC. 1971. No estate or interest in real property, other than for leases for a term not exceeding one year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered or declared, otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.

NOTE.—The preceding section is substantially section 6 of the act concerning fraudulent conveyances. (Stat. 1850, p. 267.)

Last section
not to extend
to certain
cases.

SEC. 1972. The preceding section must not be construed to affect the power of a testator in the disposition of his real property by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law, nor to abridge the power of any court to compel the specific performance of an agreement, in case of part performance thereof.

NOTE.—Substantially sections 7 and 10 of act referred to in preceding note.

Agreement
not in writ-
ing, when
invalid.

SEC. 1973. In the following cases the agreement is invalid, unless the same or some note or memorandum thereof, expressing the consideration, be in writing and

subscribed by the party charged, or by his agent; evidence, therefore, of the agreement, cannot be received without the writing or secondary evidence of its contents:

Agreement
not in writ-
ing, when
invalid.

1. An agreement that by its terms is not to be performed within a year from the making thereof.

2. A special promise to answer for the debt, default or miscarriage of another.

3. An agreement made upon consideration of marriage, other than a mutual promise to marry.

4. An agreement for the sale of goods, chattels or things in action, at a price not less than two hundred dollars, unless the buyer accept and receive part of such goods and chattels, or the evidences, or some of them, of such things in action, or pay at the time some part of the purchase money; but when a sale is made by auction, an entry by the auctioneer in his sale book, at the time of the sale, of the kind of property sold, the terms of sale, the price and the names of the purchaser and person on whose account the sale is made, is a sufficient memorandum.

5. An agreement for the leasing for a longer period than one year, or for the sale of real property or of an interest therein, and such agreement, if made by an agent of the party sought to be charged, is invalid; unless the authority of the agent be in writing, subscribed by the party sought to be charged.

NOTE.—In the preceding section we have embodied, in substance, sections 12, 13, 14 and 19 of the statute of frauds. (Stat. 1850, p. 267.)

In *Duffy vs. Hobson* (Oct. T. 1870), it was held that a written contract for the sale of land, made by an agent acting under verbal authority, was valid. We think the reason of the rule requiring the contract to be in writing applies with equal force to a contract authorizing an agent to sell.

SEC. 1974. No evidence is admissible to charge a person upon a representation as to the credit of a third person, unless such representation, or some memorandum thereof, be in writing, and either subscribed by, or in the handwriting of, the party to be charged.

Representa-
tion of credit
by writing.

N. Y. C. C. P. § 1790.

CHAPTER VII.

CONCLUSIVE OR UNANSWERABLE EVIDENCE.

SECTION 1978. Conclusive or unanswerable evidence.

Conclusive
or unanswer-
able evi-
dence.

SEC. 1978. No evidence is by law made conclusive or unanswerable, unless so declared by this code.

TITLE III.

OF THE PRODUCTION OF EVIDENCE.

CHAPTER I. *By whom to be produced.*II. *Means of production.*III. *Manner of production.*

CHAPTER I.

BY WHOM TO BE PRODUCED.

SECTION 1981. Evidence to be produced, by whom.

1982. Writing altered, who to explain.

Evidence to
be produced,
by whom.

SEC. 1981. The party holding the affirmative of the issue must produce the evidence to prove it; therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side.

N. Y. C. C. P. § 1793. •

Writing
altered, who
to explain.

SEC. 1982. The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the appearance or alteration. He may show that the alteration was made by another, without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. If he do that, he may give the writing in evidence, but not otherwise.

N. Y. C. C. P. § 1794.

CHAPTER II.

MEANS OF PRODUCTION.

SECTION 1985. Subpœna for witness defined.

1986. Subpœna, how issued.

1987. Subpœna, how served.

1988. How, if witness be concealed.

1989. When a witness is compelled to attend.

1990. Person present compelled to testify.

1991. Disobedience, how punished.

1992. Forfeiture therefor.

1993. Warrant may issue to bring witness, when.

1994. Contents of warrant.

1995. If witness be a prisoner, how brought.

1996. On whose motion.

1997. How examined.

SEC. 1985. The process by which the attendance of a witness is required is a subpœna. It is a writ or order directed to a person and requiring his attendance at a particular time and place to testify as a witness. It may also require him to bring with him any books, documents or other things under his control which he is bound by law to produce in evidence.

Subpœna
for witness
defined.

N. Y. C. C. P. § 1795.

SEC. 1986. (§ 403.) The subpœna is issued as follows :

Subpœna,
how issued

1. To require attendance before a court, or at the trial of an issue therein, it is issued under the seal of the court before which the attendance is required, or in which the issue is pending.

2. To require attendance out of the court, before a judge, justice or other officer authorized to administer oaths or take testimony in any matter under the laws of this state, it is issued by the judge, justice or any other officer before whom the attendance is required.

3. To require attendance before a commissioner appointed to take testimony by a court of a foreign country, or of the United States, or of any other state in the United States, or of any other district or county within this state, or before any officer or officers empowered by the laws of the United States to take testimony, it may be issued by any judge or justice of the peace in places within their respective jurisdiction, with like power to enforce attendance; and, upon certificate of contumacy to

said court, to punish contempt of their process, as such judge or justice could exercise if the subpoena directed the attendance of the witness before their courts in a matter pending therein.

Subpoena,
how served.

SEC. 1987. (§ 404.) The service of a subpoena is made by showing the original and delivering a copy, or a ticket containing its substance, to the witness personally, giving or offering to him at the same time, if demanded by him, the fees to which he is entitled for travel to and from the place designated, and one day's attendance there. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. Such service may be made by any person.

How, if
witness be
concealed.

SEC. 1988. (§ 405.) If a witness is concealed in a building or vessel, so as to prevent the service of a subpoena upon him, any court or judge, or any officer issuing the subpoena, may, upon proof by affidavit of the concealment, and of the materiality of the witness, make an order that the sheriff of the county serve the subpoena; and the sheriff must serve it accordingly, and for that purpose may break into the building or vessel where the witness is concealed.

When a
witness is
compelled
to attend.

SEC. 1989. (§ 402.) A witness is not obliged to attend as a witness before any court, judge, justice or any other officer, out of the county in which he resides, unless the distance be less than thirty miles from his place of residence to the place of trial.

Person present
compelled to
testify.

SEC. 1990. (§ 406.) A person present in court, or before a judicial officer, may be required to testify in the same manner as if he were in attendance upon a subpoena issued by such court or officer.

Disobedience
how punished.

SEC. 1991. (§ 409.) Disobedience to a subpoena, or a refusal to be sworn, or to answer as a witness, or to subscribe an affidavit or deposition when required, may be punished as a contempt by the court or officer issuing the subpoena or requiring the witness to be sworn; and if the witness be a party, his complaint, answer or reply may be stricken out.

SEC. 1992. (§ 410.) A witness disobeying a subpoena also forfeits to the party aggrieved the sum of one hundred dollars, and all damages which he may sustain by the failure of the witness to attend, which forfeiture and damages may be recovered in a civil action.

Forfeiture
thereof.

SEC. 1993. (§ 411) In case of failure of a witness to attend, the court or officer issuing the subpoena, upon proof of the service thereof, and of the failure of the witness, may issue a warrant to the sheriff of the county to arrest the witness and bring him before the court or officer where his attendance was required.

Warrant
may issue to
bring wit-
ness, when.

SEC. 1994. Every warrant of commitment, issued by a court or officer pursuant to this chapter, must specify therein, particularly, the cause of the commitment, and if it be for refusing to answer a question, such question must be stated in the warrant. And every warrant to arrest or commit a witness, pursuant to this chapter, must be directed to the sheriff of the county where the witness may be, and must be executed by him in the same manner as process issued by the supreme court.

Contents of
warrant.

N. Y. C. C. P. § 1805.

SEC. 1995. (§ 412.) If the witness be a prisoner, confined in a jail or prison within this state, an order for his examination in the prison upon deposition, or for his temporary removal and production before a court or officer for the purpose of being orally examined, may be made, as follows :

If witness be
a prisoner,
how brought

1. By the court itself in which the action or special proceeding is pending, unless it be a justice's court.

2. By a justice of the supreme court, judge of the district court, or county judge of the county where the action or proceeding is pending, if pending before a justice's court or before a judge or other person out of court.

SEC. 1996. (§ 413.) Such order can only be made on the motion of a party, upon affidavit showing the nature of the action or proceeding, the testimony expected from the witness, and its materiality.

On whose
motion.

SEC. 1997. (§ 414.) If the witness be imprisoned in

How exam-
ined.

the county where the action or proceeding is pending, his production may be required. In all other cases his examination, when allowed, must be taken upon deposition.

CHAPTER III.

MANNER OF PRODUCTION.

ARTICLE I. MODE OF TAKING THE TESTIMONY OF WITNESSES.

II. AFFIDAVITS.

III. DEPOSITIONS.

IV. MANNER OF TAKING DEPOSITIONS OUT OF THE STATE.

V. MANNER OF TAKING DEPOSITIONS IN THE STATE.

VI. GENERAL RULES OF EXAMINATION.

ARTICLE I.

MODE OF TAKING THE TESTIMONY OF WITNESSES.

SECTION 2002. Testimony, in what mode taken.

2003. Affidavit defined.

2004. A deposition defined.

2005. Oral examination defined.

2006. Deposition, how taken.

Testimony,
in what mode
taken.

SEC. 2002. The testimony of witnesses is taken in three modes :

1. By affidavit.
2. By deposition.
3. By oral examination.

N. Y. C. C. P. § 1809.

Affidavit
defined.

SEC. 2003. An affidavit is a written declaration under oath, made without notice to the adverse party.

N. Y. C. C. P. § 1810.

A deposition
defined.

SEC. 2004. A deposition is a written declaration under oath, made upon notice to the adverse party for the purpose of enabling him to attend and cross-examine.

N. Y. C. C. P. § 1811.

Oral exami-
nation
defined.

SEC. 2005. An oral examination is an examination in presence of the jury or tribunal which is to decide the

fact or act upon it, the testimony being heard by the jury from the lips of the witness.

N. Y. C. C. P. § 1812.

Sec. 2006. Depositions must be taken in the form of question and answer, and the words of the witness must be written down, unless the parties agree to a different mode.

Deposition,
how taken.

N. Y. C. C. P. § 1813.

ARTICLE II.

AFFIDAVITS.

Section 2009. Affidavits and depositions, how taken.

2010. Evidence of publication, what.

2011. Where filed.

2012. Affidavits to be used in this state, before whom may be taken in this state.

2013. If made in another state of the United States, before whom taken.

2014. If made in a foreign country, before whom taken.

2015. Certificate of the clerk, if taken before a judge of a court out of this state.

Sec. 2009. An affidavit may be used to verify a pleading or a paper in a special proceeding, to prove the service of a summons, notice or other paper in an action or special proceeding, to obtain a provisional remedy, the examination of a witness, or a stay of proceedings, or upon a motion, and in any other case expressly permitted by some other provision of this code.

Affidavits
and deposi-
tions, how
taken.

N. Y. C. C. P. § 1815.

Sec. 2010. Evidence of the publication of a document or notice required by law, or by an order of a court or judge, to be published in a newspaper, may be given by the affidavit of the printer of the newspaper, or his foreman or principal clerk, annexed to a copy of the document or notice, specifying the times when and the paper in which the publication was made. But such affidavit must be made within six months after the last day of publication.

Evidence of
publication,
what.

N. Y. C. C. P. § 1817.

Where filed. SEC. 2011. If such affidavit be made in an action or special proceeding pending in a court, it may be filed with the court or a clerk thereof. If not so made, it may be filed with the clerk of the county where the newspaper is printed. In either case the original affidavit, or a copy thereof certified by the court or clerk having it in custody, is primary evidence of the facts stated therein.

N. Y. C. C. P. § 1818.

Affidavits to be used in this state, before whom may be taken in this state. SEC. 2012. (§ 424.) An affidavit to be used before any court, judge or officer of this state, may be taken before any judge or clerk of any court, or any justice of the peace or notary public in this state.

If made in another state of the United States, before whom taken. SEC. 2013. (§ 425.) An affidavit taken in another state of the United States, to be used in this state, must be taken before a commissioner appointed by the governor of this state to take affidavits and depositions in such other state, or before any judge of a court of record having a seal.

If made in a foreign country, before whom taken. SEC. 2014. (§ 426.) An affidavit taken in a foreign country, to be used in this state, must be taken before an ambassador, minister or consul of the United States, or before any judge of a court of record having a seal in such foreign country.

Certificate of the clerk, if taken before a judge of a court out of this state. SEC. 2015. (§ 427.) When an affidavit is taken before a judge of a court in another state, or in a foreign country, the genuineness of the signature of the judge, the existence of the court and the fact that such judge is a member thereof, must be certified by the clerk of the court, under the seal thereof.

ARTICLE III.

DEPOSITIONS.

SECTION 2019. Deposition, when used.

2020. Testimony of a witness out of the state, when taken.

2021. In the state, when taken.

Deposition, when used. SEC. 2019. In all cases other than those mentioned in section two thousand and nine, where a written declara-

tion under oath is used, it must be a deposition as prescribed by this code.

N. Y. C. C. P. § 1819.

SEC. 2020. (§ 432.) The testimony of a witness out of the state may be taken by deposition, in an action, at any time after the service of the summons or the appearance of the defendant; and, in a special proceeding, at any time after a question of fact has arisen therein.

Testimony
of a witness
out of the
state, when
taken.

SEC. 2021. (§ 428.) The testimony of a witness in this state may be taken by deposition, in an action, at any time after the service of the summons or the appearance of the defendant; and, in a special proceeding, after a question of fact has arisen therein, in the following cases:

In the state,
when taken.

1. When the witness is a party to the action or proceeding, or a person for whose immediate benefit the action or proceeding is prosecuted or defended.

2. When the witness resides out of the county in which his testimony is to be used.

3. When the witness is about to leave the county where the action is to be tried, and will probably continue absent when the testimony is required.

4. When the witness, otherwise liable to attend the trial, is nevertheless too infirm to attend.

5. When the testimony is required upon a motion, or in any other case where the oral examination of the witness is not required.

ARTICLE IV.

MANNER OF TAKING DEPOSITIONS OUT OF THE STATE.

SECTION 2024. Testimony of witness out of state taken upon commission issued under seal, upon notice. To whom to issue.

2025. Proper interrogatories may be prepared, or may be waived by the parties.

2026. Authorities and duties of commissioner.

2027. Trial, when postponed for reason of non-return of commission.

2028. Deposition, by whom used.

SEC. 2024. (§ 433.) The deposition of a witness out of this state may be taken upon commission, issued from the court, under the seal of the court, upon an order of

Testimony
of witness
out of state
taken upon
commission
issued under
seal, upon
notice.

To whom to
issue.

the judge or court, or county judge, on the application of either party, upon five days previous notice to the other. It must be issued to a person agreed upon by the parties, or, if they do not agree, to any judge or justice of the peace, or commissioner, selected by the officer issuing it.

Proper inter-
rogatories
may be pre-
pared, or
may be wai-
ved by the
parties.

SEC. 2025. (§ 434.) Such proper interrogatories, direct and cross, as the respective parties may prepare to be settled, if the parties disagree as to their form, by the judge or officer granting the order for the commission, at a day fixed in the order, may be annexed to the commission; or, when the parties agree to that mode, the examination may be without written interrogatories.

Authorities
and duties
of commis-
sioner.

SEC. 2026. (§ 435.) The commission must authorize the commissioner to administer an oath to the witness, and to take his deposition in answer to the interrogatories, or, when the examination is to be without interrogatories, in respect to the question in dispute, and to certify the deposition to the court, in a sealed envelop, directed to the clerk or other person designated or agreed upon, and forwarded to him by mail or other usual channel of conveyance.

Trial, when
postponed
for reason of
non-return
of commis-
sion.

SEC. 2027. (§ 436.) A trial or other proceeding must not be postponed by reason of a commission not returned, except upon evidence, satisfactory to the court, that the testimony of the witness is necessary, and that proper diligence has been used to obtain it.

Deposition,
by whom
used.

SEC. 2028. The deposition mentioned in this article may be used by either party on the trial or other proceeding, against any other party giving or receiving the notice, subject to all just exceptions.

N. Y. C. C. P. § 1828.

ARTICLE V.

MANNER OF TAKING DEPOSITIONS IN THIS STATE.

SECTION 2031. Depositions may be taken before a judge, etc., upon notice to the adverse party.

2032. Manner of taking depositions. May be used by either party on the trial.

Section 2033. When deposition excluded.

2034. A deposition once taken may be read at any time.

2035. Deposition in this state to be used in other states.

2036. How to procure witness upon commission.

2037. How, if no commission.

2038. Deposition, how taken.

Sec. 2031. (§ 429.) Either party may have the deposition taken of a witness in this state, in either of the cases mentioned in section two thousand and twenty-one, before a judge or officer authorized to administer oaths, on serving upon the adverse party previous notice of the time and place of examination, together with a copy of an affidavit, showing that the case is within that section. Such notice must be at least five days, adding also one day for every twenty-five miles of the distance of the place of examination from the residence of the person to whom the notice is given, unless, for a cause shown, a judge, by order, prescribe a shorter time. When a shorter time is prescribed, a copy of the order must be served with the notice.

Depositions may be taken before a judge, etc., upon notice to the adverse party.

Sec. 2032. (§ 430) Either party may attend the examination and put such questions, direct and cross, as may be proper. The deposition, when completed, must be carefully read to the witness and corrected by him in any particular, if desired; it must then be subscribed by the witness, certified by the judge or officer taking the deposition, inclosed in an envelop or wrapper, sealed and directed to the clerk of the court in which the action is pending, or to such person as the parties in writing may agree upon, and either delivered by the judge or officer to the clerk or such person, or transmitted through the mail or by some safe private opportunity; and thereupon such deposition may be used by either party upon the trial or other proceeding against any party giving or receiving the notice, subject to all legal exceptions; but if the parties attend at the examination, no objection to the form of an interrogatory shall be made at the trial, unless the same was stated at the time of the examination. If the deposition be taken under subdivisions two, three and four, of section two thousand and twenty-one, proof must be made at the trial that the witness continues absent or infirm, or is dead. The deposition thus taken may be also read in case of the death of the witness.

Manner of taking depositions.

May be used by either party on the trial.

When deposition excluded.

SEC. 2033. Notwithstanding the taking of a deposition, it may be excluded from the case upon proof that sufficient notice was not given to the party against whom it is offered to enable him to attend the taking thereof, or that the taking was not in all respects fair.

N. Y. C. C. P. § 1831.

A deposition once taken may be read at any time.

SEC. 2034. (§ 431.) When a deposition has been once taken, it may be read by either party in any stage of the same action or proceeding, or in any other action between the same parties, upon the same subject, and is then deemed the evidence of the party reading it.

Deposition in this state to be used in other states.

SEC. 2035. Any party to an action or special proceeding in a court, or before a judge, of a sister state, may obtain the testimony of a witness residing in this state, to be used in such action or proceeding, in the cases mentioned in the next two sections.

N. Y. C. C. P. § 1833.

How to procure witness upon commission.

SEC. 2036. If a commission to take such testimony has been issued from the court or judge before whom such action or proceeding is pending, on producing the commission to a justice of the supreme court or a county judge, with an affidavit satisfactory to him of the materiality of the testimony, he may issue a subpoena to the witness, requiring him to appear and testify before the commissioner named in the commission, at a specified time and place.

N. Y. C. C. P. § 1834.

How, if no commission.

SEC. 2037. If a commission has not been issued, and it appears to a justice of the supreme court, county judge or justice, by affidavit satisfactory to him—

1. That the testimony of the witness is material to either party.

2. That a commission to take the testimony of such witness has not been issued.

3. That, according to the law of the state where the action or special proceeding is pending, the deposition of a witness taken under such circumstances and before such judge or justice will be received in the action or proceeding—

He must issue his subpoena, requiring the witness to

appear and testify before him at a specified time and place.

N. Y. C. C. P. § 1835.

Sec. 2038. Upon the appearance of the witness, the judge or justice must cause his testimony to be taken in writing, and must certify and transmit the same to the court or judge before whom the action or proceeding is pending, in such manner as the law of that state requires.

Deposition,
how taken.

N. Y. C. C. P. § 1836.

ARTICLE VI.

GENERAL RULES OF EXAMINATION.

SECTION 2042. Order of proof, how regulated.

2043. Witnesses not under examination may be excluded.

2044. Court may control mode of interrogation.

2045. Direct and cross-examination defined.

2046. Leading question defined.

2047. When witness may refresh memory from notes.

2048. Cross-examination, as to what.

2049. Party producing not allowed to lead witness.

2050. Witness, how examined. When re-examined.

2051. How impeached.

2052. Same.

2053. Evidence of good character, when allowed.

2054. Writing shown to witness may be inspected by adverse party.

Sec. 2042. The order of proof must be regulated by the sound discretion of the court. Ordinarily, the party beginning the case must exhaust his evidence before the other party begins.

Order of
proof, how
regulated.

N. Y. C. C. P. § 1837.

Sec. 2043. If either party requires it, the judge may exclude from the court-room any witness of the adverse party, not at the time under examination, so that he may not hear the testimony of other witnesses.

Witnesses
not under
examination
may be ex-
cluded.

N. Y. C. C. P. § 1838.

Sec. 2044. The court must exercise a reasonable control over the mode of interrogation, so as to make it as rapid, as distinct, as little annoying to the witness and as effective for the extraction of the truth as may be; but subject to this rule, the parties may put such pertinent

Court may
control mode
of interroga-
tion.

and legal questions as they see fit. The court, however, may stop the production of further evidence upon any particular point when the evidence upon it is already so full as to preclude reasonable doubt.

N. Y. C. C. P. § 1840.

Direct and cross-examination defined.

SEC. 2045. The examination of a witness by the party producing him is denominated the direct examination; the examination of the same witness, upon the same matter, by the adverse party, the cross-examination. The direct examination must be completed before the cross-examination begins, unless the court otherwise direct.

N. Y. C. C. P. § 1841.

Leading question defined.

SEC. 2046. A question which suggests to the witness the answer which the examining party desires, is denominated a leading or suggestive question. On a direct examination, leading questions are not allowed, except in the sound discretion of the court, under special circumstances making it appear that the interests of justice require it.

N. Y. C. C. P. § 1842.

When witness may refresh memory from notes.

SEC. 2047. A witness is allowed to refresh his memory respecting a fact, by anything written by himself or under his direction at the time when the fact occurred or immediately thereafter, or at any other time when the fact was fresh in his memory and he know that the same was correctly stated in the writing. But in such case the writing must be produced and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it and may read it to the jury. So, also, a witness may testify from such a writing, though he retain no recollection of the particular facts, but such evidence must be received with caution.

N. Y. C. C. P. § 1843.

Cross-examination, as to what.

SEC. 2048. The opposite party may cross-examine the witness as to any facts stated in his direct examination or connected therewith, and in so doing may put leading questions, but if he examine him as to other matters, such examination is to be subject to the same rules as a direct examination.

N. Y. C. C. P. § 1844.

SEC. 2049. The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony, as provided in section two thousand and fifty-two.

Party producing not allowed to lead witness.

N. Y. C. C. P. § 1845.

SEC. 2050. A witness once examined cannot be re-examined as to the same matter without leave of the court, but he may be re-examined as to any new matter upon which he has been examined by the adverse party. And after the examinations on both sides are once concluded, the witness cannot be recalled without leave of the court. Leave is granted or withheld, in the exercise of a sound discretion.

Witness how examined.

When re-examined.

N. Y. C. C. P. § 1846.

SEC. 2051. A witness may be impeached by the party against whom he was called, by contradictory evidence or by evidence that his general reputation for truth, honesty or integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he has been convicted of a felony.

How impeached.

N. Y. C. C. P. § 1847 ; Statutes of 1868, p. 193.

SEC. 2052. A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them.

Same.

N. Y. C. C. P. § 1848.

SEC. 2053. Evidence of the good character of a party is not admissible in a civil action, nor of a witness in any action, until the character of such party or witness has been impeached, or unless the issue involves his character.

Evidence of good character, when allowed.

N. Y. C. C. P. § 1849.

Writing
shown to
witness may
be inspected
by adverse
party.

SEC. 2054. Whenever a writing is shown to a witness, it may be inspected by the opposite party, and if proved by the witness must be read to the jury before his testimony is closed, or it cannot be read except on recalling the witness.

N. Y. C. C. P. § 1850.

TITLE IV.

OF THE EFFECT OF EVIDENCE.

SECTION 2061. Jury judges of effect of evidence, but to be instructed on certain points.

Jury judges
of effect of
evidence,
but to be in-
structed on
certain
points.

SEC. 2061. The jury, subject to the control of the court, in the cases specified in this code, are the judges of the effect or value of evidence addressed to them, except when it is hereby declared to be conclusive. They are, however, to be instructed by the court on all proper occasions—

1. That their power of judging of the effect of evidence is not arbitrary, but to be exercised with legal discretion, and in subordination to the rules of evidence.

2. That they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds.

3. That a witness false in one part of his testimony is to be distrusted in others.

4. That the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution

5. That in civil cases the affirmative of the issue must be proved, and when the evidence is contradictory the decision must be made according to the preponderance of evidence; that in criminal cases guilt must be established beyond reasonable doubt.

6. That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict; and, therefore,

7. That if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust.

N. Y. C. C. P. § 1852.

TITLE V.

OF THE RIGHTS AND DUTIES OF WITNESSES.

SECTION 2064. Witnesses bound to attend when subpoenaed.

2065. Witnesses bound to answer questions.

2066. Right of witnesses to protection.

2067. Witnesses protected from arrest when attending, or going or returning.

2068. Arrest to be made void, and party making arrest liable, etc.

2069. To make affidavit if arrested.

2070. Court to discharge witness from arrest.

SEC. 2064. (§ 407.) A witness, served with a subpoena, must attend at the time appointed, with any papers under his control required by the subpoena, and answer all pertinent and legal questions; and, unless sooner discharged, must remain until the testimony is closed.

Witnesses bound to attend when subpoenaed.

* **SEC. 2065.** (§ 408.) A witness must answer questions legal and pertinent to the matter in issue, though his answer may establish a claim against himself; but he need not give an answer which will have a tendency to subject him to punishment for a felony; nor need he give an answer which will have a direct tendency to degrade his character, unless it be to the very fact in issue, or to a fact from which the fact in issue would be presumed. But a witness must answer as to the fact of his previous conviction for felony.

Witnesses bound to answer questions.

SEC. 2066. It is the right of a witness to be protected from irrelevant, improper or insulting questions, and from harsh or insulting demeanor; to be detained only so long as the interests of justice require it; to be examined only as to matters legal and pertinent to the issue.

Right of witnesses to protection.

N. Y. C. C. P. § 1855.

SEC. 2067. (§ 415.) Every person who has been, in good

Witnesses
protected
from arrest
when attend-
ing, or going
or returning.

faith, served with a subpoena to attend as a witness before a court, judge, commissioner, referee or other person, in a case where the disobedience of the witness may be punished as a contempt, is exonerated from arrest in a civil action while going to the place of attendance, necessarily remaining there and returning therefrom.

Arrest so
made void,
and party
making ar-
rest liable,
etc.

SEC. 2068. (§ 416.) The arrest of a witness, contrary to the preceding section, is void, and when wilfully made, is a contempt of the court; and the person making it is responsible to the witness arrested for double the amount of the damages which may be assessed against him, and is also liable to an action at the suit of the party serving the witness with the subpoena, for the damages sustained by him in consequence of the arrest.

N. Y. C. C. P. § 1856.

To make affi-
davit if ar-
rested.

SEC. 2069. (§ 416.) An officer is not liable to the party for making the arrest in ignorance of the facts creating the exoneration, but is liable for any subsequent detention of the party, if such party claim the exemption and make an affidavit stating—

1. That he has been served with a subpoena to attend as a witness before a court, officer or other person, specifying the same, the place of attendance, and the action or proceeding in which the subpoena was issued; and,

2. That he has not thus been served by his own procurement, with the intention of avoiding an arrest.

3. That he is at the time going to the place of attendance, or returning therefrom, or remaining there in obedience to the subpoena.

The affidavit may be taken by the officer, and exonerates him from liability for discharging the witness when arrested.

Court to dis-
charge wit-
ness from
arrest.

SEC. 2070. The court or officer issuing the subpoena, and the court or officer before whom the attendance is required, may discharge the witness from an arrest made in violation of section two thousand and sixty-seven. If the court have adjourned before the arrest, or before application for the discharge, a judge of the court or a county judge may grant the discharge.

N. Y. C. C. P. § 1858.

TITLE VI.

OF EVIDENCE IN PARTICULAR CASES, AND MISCELLANEOUS
AND GENERAL PROVISIONS.CHAPTER I. *Evidence in particular cases.*II. *Proceedings to perpetuate testimony.*III. *Administration of oaths and affirmations.*IV. *General provisions.*

CHAPTER I.

EVIDENCE IN PARTICULAR CASES.

SECTION 2074. An offer equivalent to payment.

2075. Whoever pays entitled to receipt.

2076. Objections to tender must be specified.

2077. Rules for construing description of lands.

2078. Compromise offer of no avail, but admission of facts may be shown.

2079. In action for divorce, admission not sufficient.

SEC. 2074. An offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument or property.

An offer
equivalent
to payment.

N. Y. C. C. P. § 1859.

SEC. 2075. Whoever pays money, or delivers an instrument or property, is entitled to a receipt therefor from the person to whom the payment or delivery is made, and may demand a proper signature to such receipt as a condition of the payment or delivery.

Whoever
pays entitled
to receipt.

N. Y. C. C. P. § 1860.

SEC. 2076. The person to whom a tender is made must, at the time, specify any objection he may have to the money, instrument or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms or

Objections to
tender must
be specified.

kind which he requires, or be precluded from objecting afterwards.

N. Y. C. C. P. § 1861.

Rules for
construing
description
of lands.

SEC. 2077. The following are the rules for construing the descriptive part of a conveyance of real property, when the construction is doubtful and there are no other sufficient circumstances to determine it.

1. Where there are certain definite and ascertained particulars in the description, the addition of others which are indefinite, unknown or false, does not frustrate the conveyance, but it is to be construed by the first mentioned particulars.

2. When permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles or surfaces, the boundaries or monuments are paramount.

3. Between different measurements which are inconsistent with each other, that of angles is paramount to that of surfaces, and that of lines paramount to both.

4. When a road, or a stream of water not navigable, is the boundary, the rights of the grantor to the middle of the road or the thread of the stream, are included in the conveyance, except where the road or bed of the stream is held under another title.

5. When tide water is the boundary, the rights of the grantor to low water mark are included in the conveyance.

6. When the description refers to a map and that reference is inconsistent with other particulars, it controls them if it appear that the parties acted with reference to the map; otherwise the map is subordinate to other definite and ascertained particulars.

N. Y. C. C. P. § 1862.

Compromise
offer of no
avail, but
admission of
facts may be
shown.

SEC. 2078. An offer of compromise is not an admission that anything is due; but admissions of particular facts, made in a negotiation for a compromise, may be proved, unless otherwise specially agreed at the time.

N. Y. C. C. P. § 1863.

In action for
divorce, ad-
mission not
sufficient.

SEC. 2079. In an action for divorce on the ground of adultery, a confession of adultery, whether in or out of

the pleadings, is not of itself sufficient to justify a judgment of divorce.

N. Y. C. C. P. § 1864.

CHAPTER II.

PROCEEDINGS TO PERPETUATE TESTIMONY.

SECTION 2083. Evidence may be perpetuated.

2084. Manner of application for order.

2085. Notice of time and place to be given.

2086. Manner of taking the deposition.

2087. Deposition to be filed.

2088. When the evidence may be produced.

2089. Effect of the deposition.

SEC. 2083. (§ 437.) The testimony of a witness may be taken and perpetuated as provided in this chapter. Evidence may be perpetuated.

SEC. 2084. (§ 438.) The applicant must produce to a district judge, or to a county judge, an affidavit stating— Manner of application for order.

1. That the applicant is, or expects to be, a party to an action or proceeding in a court of this state, and the name of the adverse party.

2. That the testimony of a witness residing in this state, whose place of residence is stated, is necessary to the prosecution or defence of such action or proceeding; and, generally, the facts expected to be proved.

3. If the action be not actually commenced, that the party named, who is expected to be adverse to the applicant, resides or is at the time in this state, and is of full age.

The judge may, thereupon, in his discretion, make an order allowing the examination, and prescribing how long before the examination the order and notice of the time and place therefor must be served.

SEC. 2085. Upon proof of personal service upon the person who is, or is expected to be, the adverse party of the order, copy of the affidavit and of a notice that the examination will be taken before a judge of the district court, or county judge of the county wherein the witness resides, or may be at a specified time and place, such Notice of time and place to be given.

judge may take the deposition of the witness conditionally, and the examination may, if necessary, be adjourned from time to time.

N. Y. C. C. P. § 1867.

Manner of
taking the
deposition.

SEC. 2086. Every answer or declaration of the witness must be taken down, unless the parties otherwise agree. The deposition, when completed, must be carefully read to, and subscribed by, the witness, then certified by the judge, and immediately thereafter filed in the office of the clerk of the county where it was taken, together with the order for the examination of the witness, the affidavit on which the same was granted and the affidavit of service of the affidavit, order and notice.

N. Y. C. C. P. § 1868.

Deposition to
be filed.

SEC. 2087. The affidavits filed with the deposition, or a certified copy thereof, are primary evidence of the facts stated therein, to show compliance with the provisions of this chapter.

N. Y. C. C. P. § 1869.

When the
evidence
may be pro-
duced.

SEC. 2088. If a trial be had between the parties named in the affidavit as parties actual or expectant, or their successors in interest, upon proof of the death or insanity of the witness, or of his inability to attend the trial by reason of age, sickness or settled infirmity, the deposition or a certified copy thereof may be given in evidence by either party.

N. Y. C. C. P. § 1870.

Effect of the
deposition.

SEC. 2089. The deposition so taken and read in evidence has the same effect as the oral testimony of the witness, and no other, and every objection to the witness or to the relevancy of any question put to him, or of any answer given by him, may be made in the same manner as if he were examined orally at the trial.

N. Y. C. C. P. § 1871.

CHAPTER III.

ADMINISTRATION OF OATHS AND AFFIRMATIONS.

SECTION 2093. Judicial and certain officers authorized to administer oaths.

2094. Form of ordinary oath to a witness.

2095. Another form.

2096. Form may be varied to suit witness' belief.

2097. Same.

2098. Any person who prefers it may declare or affirm.

SEC. 2093. Every court, every judge or clerk of any court, every justice and every notary public, officer or person authorized to take testimony in any action or proceeding, or to decide upon evidence, has power to administer oaths or affirmations to witnesses.

Judicial and certain officers authorized to administer oaths.

N. Y. C. C. P. § 1872.

SEC. 2094. An oath is usually administered as follows: The person who swears lays his hand upon the gospels, while the person administering the oath thus addresses him: "You do swear that the evidence you shall give in this issue (or matter) pending between ——— and ———, shall be the truth, the whole truth and nothing but the truth, so help you God," and thereupon the person who swears assents by kissing the book.

Form of ordinary oath to a witness.

N. Y. C. C. P. § 1873.

SEC. 2095. Any person who desires it may swear by expressing his assent, when addressed in the following form: "You do swear, in the presence of the everlasting God, that the evidence you shall give," etc., as in the last, holding up his hand or not, at his option.

Another form.

N. Y. C. C. P. § 1874.

SEC. 2096. Whenever the court before which a person is offered as a witness is satisfied that he has a peculiar mode of swearing, connected with or in addition to the usual form of administration, which, in his opinion, is more solemn or obligatory, the court may, in its discretion, adopt that mode.

Form may be varied to suit witness belief.

N. Y. C. C. P. § 1875.

SEC. 2097. When a person is sworn who believes in any other than the christian religion, he may be sworn accord-

Same.

ing to the peculiar ceremonies of his religion, if there be any such.

N. Y. C. C. P. § 1876.

Any person who prefers it may declare or affirm.

SEC. 2098. Any person who desires it may, at his option, instead of taking an oath make his solemn affirmation or declaration, by assenting, when addressed in the following form: "You do solemnly affirm (or declare) that," etc., as in section two thousand and ninety-four.

N. Y. C. C. P. § 1877.

CHAPTER IV.

GENERAL PROVISIONS.

SECTION 2101. Questions of fact to be decided by jury, and the evidence addressed to them.

2102. Questions of law addressed to the court.

2103. Questions of fact by court or referees.

2104. Repealing section.

Questions of fact to be decided by jury, and the evidence addressed to them.

SEC. 2101. All questions of fact, other than those mentioned in the next section, are to be decided by the jury, and all evidence thereon addressed to them, except when otherwise provided by this code.

N. Y. C. C. P. § 1879.

Questions of law addressed to the court.

SEC. 2102. All questions of law, including the admissibility of testimony, the facts preliminary to such admission and the construction of statutes and other writings, and other rules of evidence, are to be decided by the court, and all discussions of law addressed to it. Whenever the knowledge of the court is, by this code, made evidence of a fact, the court is to declare such knowledge to the jury, who are bound to accept it.

N. Y. C. C. P. § 1880.

Questions of fact by court or referees.

SEC. 2103. The provisions contained in this part of the code respecting the evidence on a trial before a jury, are equally applicable on the trial of a question of fact before a court, referee or other officer.

N. Y. C. C. P. § 1881.

Repealing section.

SEC. 2104. All the rules and laws of evidence heretofore existing in this state, in any case provided for by this code, or inconsistent with it, are abrogated and repealed.

N. Y. C. C. P. § 1883.

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